

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

DePuy Mitek, Inc.)	
a Massachusetts Corporation)	
)	
Plaintiff,)	
)	
v.	)	Civil No. 04-12457 PBS
)	
Arthrex, Inc.)	
a Delaware Corporation and)	
)	
Pearsalls Ltd.)	
a Private Limited Company)	
of the United Kingdom)	
)	
Defendants.)	

**DePuy Mitek's Memorandum in Support of it Motion to Strike Arthrex's Reliance
On Its Own Interrogatory Contentions and Dr. Mukherjee's TigerWire Opinions In
Opposition to DePuy Mitek's Motion For Summary Judgment of
Infringement and No Inequitable Conduct**

Table of Contents

I.	Arthrex’s Reliance On Its Contention Interrogatory Responses Should Be Stricken	1
A.	Defendants’ Interrogatory Responses Are Inadmissible Hearsay Under FED. R. EVID. 801(c)	1
B.	Defendants’ Interrogatory Responses Are Inadmissible Because They Do Not Qualify As Expert Testimony	2
II.	Dr. Mukherjee’s Opinion That TigerWire’s Nylon Materially Affects Pliability Is Inadmissible Because It Lacks A Reliable Method And Foundation	3
A.	Dr. Mukherjee’s TigerWire “Drape” and “Feel” Tests Are Inadmissible Because He Did Not Conduct Any Such Tests.....	4
B.	Dr. Mukherjee’s TigerWire/Pliability Opinion Should Be Excluded Because It Is Scientifically Unreliable.....	5
1.	Legal Standards For Admitting Dr. Mukherjee’s “Drape” Test & Pliability Opinions	5
2.	Dr. Mukherjee Admits That His “Drape” Test Does Not Satisfy <i>Daubert’s</i> Admissibility Standards.....	6
3.	Dr. Mukherjee Admitted That He Relied On the Wrong Nylon Data	8
4.	Dr. Mukherjee’s Opinion Regarding Nylon’s Effects Is Not Based On A Reliable Methodology or Foundation	9
III.	Conclusion	12

Table of Authorities

Federal Cases

<i>Albert v. Warner-Lambert Co.</i> , 234 F. Supp. 2d 101 (D. Mass 2002)	10
<i>Amorgianos v. Amtrak</i> , 303 F.3d 256 (2nd Cir. 2002).....	9
<i>Celebrity Cruises, Inc. v. Essef Corp.</i> , 434 F. Supp. 2d 169 (S.D. N.Y. 2006).....	11
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	<i>passim</i>
<i>Duff v. Lobdell-Emery Manufacturing Co.</i> , 926 F. Supp. 799 (N.D. Ind. 1996)	2
<i>GE v. Joiner</i> , 522 U.S. 136 (1997).....	5
<i>Garside v. Osco Drug, Inc.</i> , 895 F.2d 46 (1st Cir. 1990).....	2
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999).....	5
<i>Morrow v. Wal-Mart Stores, Inc.</i> , 152 F.3d 559 (7th Cir. 1998)	2
<i>United States of America v. Rodriguez-Felix</i> , 450 F.3d 1177 (10th Cir 1998)	8

Federal Statutes

Fed. R. Civ. P. 26(b)	2
Fed. R. Evid. 104	1, 5
Fed. R. Evid. 104(a).....	1, 5
Fed. R. Evid. 702	2, 5, 10, 11
Fed. R. Evid. 801(c).....	2
Fed. R. Evid. 801(d)(2).....	2

I. Arthrex's Reliance On Its Contention Interrogatory Responses Should Be Stricken

In opposing Mitek's motion for summary judgment of infringement, Arthrex argues that its FiberWire products do not infringe because "tipping" has a material affect on the novel and basic characteristics of the invention claimed in Mitek's U.S. Patent No. 5,314,446. Arthrex also argues that the reverse doctrine of equivalents applies. The only evidentiary support that Arthrex cites to is defendants' responses to Mitek's contention interrogatories (Arthrex SJ Opp. at 8 *citing to* Arthrex SJ Opp. Exs. 14 and 15).¹ But defendants' contention interrogatory responses are not admissible by Arthrex because they are hearsay, attorney argument, and essentially expert testimony from unqualified counsel. As the proponent of the evidence, Arthrex bears the burden of proving its admissibility under FED. R. EVID. 104(a) by a preponderance of the evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 n.10 (1993). Arthrex cannot sustain that burden here. Therefore, defendants interrogatory responses (Arthrex SJ Opp. Exs. 14 and 15) and Arthrex's reliance on them (Arthrex SJ Opp. at 8-9; Arthrex Response to Mitek Facts 12, 16, 20, 21, 22, 34, 37, and 38) should be stricken.

A. Defendants' Interrogatory Responses Are Inadmissible Hearsay Under FED. R. EVID. 801(c)

In opposing Mitek's motion for summary judgment of infringement, Arthrex relies on defendants' responses to contention interrogatories to prove the truth of the matter regarding the effects of tipping FiberWire and how FiberWire operates relative to the claimed invention (Arthrex SJ Opp. at 8 *citing to* Arthrex SJ Opp. Exs. 14 and 15). But Arthrex's offering of its

¹ "Arthrex SJ Opp." refers to "Defendants' Opposition to DePuy Mitek's Motion for Summary Judgment of Infringement and No Inequitable Conduct." "Arthrex SJ Opp. Ex." refers to the exhibits to "Defendants' Opposition to DePuy Mitek's Motion for Summary Judgment of Infringement and No Inequitable Conduct." "Arthrex Response to Mitek Fact" refers to "Defendants' Responses to DePuy Mitek's Statement of Undisputed Material Facts In Support of Its Motion for Summary Judgment of No Inequitable Conduct." This memorandum is supported by Mitek's Exhibits which are attached hereto and cited as "Ex. #."

own interrogatory responses for the truth of the matter asserted is hearsay as defined in FED. R. EVID. 801(c) and should be stricken. *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990) (citing cases; affirming district court's holding that interrogatory responses are inadmissible hearsay on summary judgment); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 803 (N.D. Ind. 1996) (granting motion to strike party's reliance on its own interrogatory answers).

Interrogatory responses may be admissible as nonhearsay under FED. R. EVID. 801(d)(2) if they qualify as an admission by a party-opponent. But Arthrex's reliance on defendants' interrogatory responses does not qualify as an admission by a party-opponent. Thus, Arthrex may not admit or rely on defendants' responses to contention interrogatories, as evidence on summary judgment or at trial, because it is well-established that "hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment." *Garside*, 895 F.2d at 50; *see also Morrow v. Wal-Mart Stores, Inc.*, 152 F.3d 559, 563 (7th Cir. 1998) ("hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial").

B. Defendants' Interrogatory Responses Are Inadmissible Because They Do Not Qualify As Expert Testimony

FED. R. EVID. 702 and FED. R. CIV. P. 26(b) set forth very specific requirements for expert testimony. Defendants' contention interrogatory responses raise issues regarding tipping, the effect of tipping on the novel and basic characteristics of the invention, and the reverse doctrine of equivalents. All of these issues are properly the subject of expert testimony and are properly subject to the requirements set forth in the Federal Rules. But Arthrex's counsel is not qualified to provide expert testimony and should not be able to evade the admissibility requirements for expert testimony that are set forth in FED. R. EVID. 702 and FED. R. CIV. P. 26(b).

II. Dr. Mukherjee's Opinion That TigerWire's Nylon Materially Affects Pliability Is Inadmissible Because It Lacks A Reliable Method And Foundation

TigerWire is basically identical to FiberWire except that it has a nylon marker band that is substituted for one PET yarn (Ex. 1 at 31:24-32:16; 79:17-80:4; 106:20-25), and does not have blue dye. Arthrex admits that the purpose of the black nylon marker band is to provide TigerWire with a striped black and white look, so that it is visually identifiable by a surgeon (Ex. 2 at 74:21-76:5). Nevertheless, Arthrex opposes Mitek's summary judgment motion by alleging that there is no infringement because Dr. Mukherjee has opined that the nylon marker band materially affects TigerWire's pliability (Arthrex SJ Opp. at 7, n.5; Arthrex Response To Mitek Facts 40-45, *citing to* Arthrex SJ Opp. Ex. 6 at 30-31). Mitek moves to strike this opinion as lacking a reliable foundation and methodology.

In his rebuttal expert report, Dr. Mukherjee describes "drape" and "feel" tests, certain nylon material properties, and unidentified, hearsay statements that allegedly support his opinion that TigerWire does not infringe Mitek's 446 Patent. But Arthrex has a problem because Dr. Mukherjee never performed these so-called drape and feel tests on TigerWire, per his own deposition testimony, and thus, they cannot be admissible evidence here. Dr. Mukherjee's "drape" test is further inadmissible because Dr. Mukherjee admitted that it is not scientifically reliable. Also, Dr. Mukherjee's opinion based on material properties is inadmissible because he admittedly relied on the wrong material properties. Finally, his opinion based on unsupported, hearsay statements is contradicted by Arthrex's own admissions, which he failed to consider. Thus, Dr. Mukherjee's "opinions" about TigerWire are not based on any scientifically reliable methodology and should be stricken.

A. Dr. Mukherjee's TigerWire "Drape" and "Feel" Tests Are Inadmissible Because He Did Not Conduct Any Such Tests

Dr. Mukherjee admitted that he never performed any "drape" or "feel" tests on TigerWire. Therefore, any opinion predicated on such tests is unsupported and should be stricken.

According to Dr. Mukherjee, drape tests involve draping a suture over his "extended index finger and observing the degree to which the suture conforms to the shape of" his finger (Ex. 3 at 27). Although Dr. Mukherjee reported a TigerWire "drape" test in his rebuttal report (*id.* at 31), he admitted at his deposition that he had never conducted such a test:

Q. Let me ask a better question. Did you do a drape test of any other FiberWire or TigerWire samples in forming your opinions?

A. No.

Q. You saw a TigerWire suture, you said?

A. Yeah, it was shown there in the -- the -- the booth.

Q. But you didn't do a drape test --

A. No.

Q. -- of the TigerWire?

Did Mr. Tamburo give you TigerWire samples to do a drape test?

A. No.

Q. Did you do a drape test of TigerWire while Mr. Tamburo was present?

A. No, no. TigerWire, I wouldn't have done anything.

(Ex. 4 at 515:5-8; 515:18-516:5).

Dr. Mukherjee also states in his report that he "felt" TigerWire, but again at his deposition, he could only remember "seeing" TigerWire and admitted that he had not done anything with TigerWire (*id.* at 515:13-20; 516:4-5; 122:7-124:17).²

² Significantly, Arthrex misstates Dr. Mukherjee's opinion in its response to Mitek Facts 40-45. According to Arthrex, Dr. Mukherjee stated that "nylon *would* adversely affected [sic]

The fact that Dr. Mukherjee did not produce any TigerWire samples in response to a subpoena requesting all tested samples is further evidence that he did not perform any such tests (Ex. 5 at Things to Be Produced Request No. 1). Dr. Mukherjee only produced two FiberWire samples in response to the subpoena (Ex. 4 at 511:16-20). According to Dr. Mukherjee those are the only two samples that he tested (Ex. 4 at 509:7-15; 511:16-20).³

Thus, as Dr. Mukherjee did not actually perform the tests described in his report, they should be stricken.

B. Dr. Mukherjee's TigerWire/Pliability Opinion Should Be Excluded Because It Is Scientifically Unreliable

1. Legal Standards For Admitting Dr. Mukherjee's "Drape" Test & Pliability Opinions

In order for expert testimony to be admissible it must satisfy FED. R. EVID. 702. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); *Daubert*, 509 U.S. at 589. Under *Daubert*, this Court acts as a "gatekeeper," excluding "junk science" that does not meet the standards of reliability required under Rule 702. *GE v. Joiner*, 522 U.S. 136, 142 (1997). The trial court accomplishes this goal through a preliminary determination that the proffered evidence is both reliable and relevant under FED. R. EVID. 104(a). FED. R. EVID. 104 advisory committee's note; *Daubert*, 509 U.S. at 589-95.

Scientific evidence is deemed reliable if the principles and methodology used by the expert proffering it are grounded in methods of science. *Id.* at 592-95. A non-exhaustive list of factors for determining whether scientific testimony is sufficiently reliable to be admitted into evidence, include:

knot tie-down" (Arthrex Response To Mitek Fact 40). But Dr. Mukherjee merely opined that the feel "*would suggest* that the addition of the nylon would adversely affect knot tie-down" (Arthrex Ex. 6 at 31). Arthrex conspicuously omits the word "suggest."

³ The only other option is that Dr. Mukherjee disposed of the samples. If that is the case, the spoliation of evidence is a further ground for exclusion.

- (1) whether the scientific theory or technique can be (and has been) tested;
- (2) whether the theory or technique has been subject to peer review and publication;
- (3) whether there is a known or potential error rate;
- (4) the existence of standards controlling the technique's operation; and
- (5) the level of the theory's or technique's acceptance within the relevant discipline.

Id. at 593-94.

In addition to considering reliability, the Court must assess whether the principles and methods have been properly applied to the facts of the case. *Id.* at 593. As the proponent of Dr. Mukherjee's testimony, Arthrex bears the burden of establishing that his testimony is admissible by a preponderance of the evidence. *Id.* at 593, n.10.

2. Dr. Mukherjee Admits That His "Drape" Test Does Not Satisfy *Daubert's* Admissibility Standards

Even if Dr. Mukherjee had conducted a TigerWire drape test, which he did not, it would be inadmissible because Dr. Mukherjee admitted that his drape tests are not scientifically reliable. At his deposition, Dr. Mukherjee was cross-examined by providing him with two *FiberWire* samples and asking him to conduct his drape test. After extensive cross-examination about the subjective nature of his drape test, Dr. Mukherjee admitted no less than *eight times* that drape tests are scientifically unreliable:

- Q. Now, the drape test that you performed, is there any literature that describes drape tests?
- A. No, this is just a very subjective test. And I just wanted to get a feel for that. That's why I did. *It's not scientific.*
- Q. Okay. Did -- have you ever -- did you consider -- in your analysis, did you ask what the history of the Exhibits 364 and 365 sutures were, how they were handled before you got them?
- A. No, I didn't. This is just a curiosity for my sake. That's what I did, so I was not -- *it was not a scientific*, just done -- I just wanted to know, because I had suture experience, just to see what it looked like.

- A. And, you know, I also look at this part, whether it's really conforming to this side of the finger.
- Q. Okay.
- A. *Again, this is very subjective, scientific -- not a scientific --*
- Q. Okay.
- A. -- test.
- Q. Did you factor in your analysis how far down the suture hangs from either side, whether it had to be equal or not?
- A. I -- I -- I tried to do it equal.
- Q. Okay.
- A. *And again, it's an unscientific, it's a --* it's just a feel of the suture and my point of view.
- Q. Uh-huh.
- A. Get a feel what the suture looked like.
- Q. Well, you just did. You just changed the position of your hand and that changed how it conformed, right?
- A. Well, no, I don't think so.
- Q. You did. You rotated your hand.
- A. *Again, this is a very --*
- A. *-- subjective --*
- A. *-- nonscientific --*
- Q. Okay.
- A. -- test.
- Q. Okay. And you agree this isn't a scientific test?
- A. I -- I -- I'm repeating. *This is not a scientific.* It's my way to look at the sutures --
- Q. Okay.
- A. -- what I feel like, that's all.
- Q. Now, if you adjust the suture in your hand could that change how it conforms?
- A. I will not guess on anything. *This is not a scientific test, this is just to get a feel. I have to rely on Dr. Burks' report and Norman Gitis' report, more scientific basis to show the difference. This is no way to make a conclusion. This is a nonscientific test.*

(Ex. 4 at 509:16-20; 513:7-16; 517:3-10; 518:19-519:2; 521:17-522:4; 523:3-17) (emphasis added) (objections omitted). Dr. Mukherjee further admitted that his “drape” test was not subject to peer review, which is another *Daubert* indication that his test should not be admitted:

- Q. Now, the drape test that you performed, is there any literature that describes drape tests?
- A. No, this is just a very subjective test. And I just wanted to get a feel for that. That's why I did. It's not scientific.

(*id.* at 509:16-20); *United States of America v. Rodriguez-Felix*, 450 F.3d 1117, 1126 (10th Cir 1998). In fact, Dr. Mukherjee’s “drape” test is so speculative that he admitted that he did not even consider whether a draped suture would still confirm to the shape of his hand in the same way, if he moved his hand:

- Q. Okay. If you change the position of the suture in your hand can that change how it conforms –
- A. I -- I cannot --
- Q. -- to your hand?
- A. I cannot comment on that because those are not things I -- I considered.
- Q. You didn't?
- A. No.

(Ex. 4 at 523:19-524:3) (objection omitted). Also, Dr. Brookstein criticized Dr. Mukherjee’s drape test as not being scientifically valid for a number of reasons (Ex. 6 at ¶53), and that testimony was not rebutted. Accordingly, Dr. Mukherjee’s TigerWire “drape” test should not be admitted.

3. Dr. Mukherjee Admitted That He Relied On the Wrong Nylon Data

Dr. Mukherjee also opined that TigerWire’s nylon marker band materially affected pliability because it is allegedly stiffer than the FiberWire PET yarn that it replaced and allegedly has a different diameter. But Dr. Mukherjee’s opinion was based on the wrong data. Dr. Mukherjee relied on the properties of nylon 6,6 “molding compound” (Ex. 3 at 30 *citing to* Ex.

26). But to do so was scientifically unacceptable because TigerWire uses nylon fiber, not nylon molding compound (Ex. 1. at 79:25-80:4; Ex. 4 at 526:4-7). Dr. Mukherjee admitted that nylon molding compound properties are not the same as those for nylon fibers (Ex. 4 at 476:5-477:4).⁴

As he cannot, Dr. Mukherjee failed to show that nylon molding compound properties are comparable to fiber properties. Further, Dr. Mukherjee provided no peer-review, accepted theory or technique that permits citing molding compound properties in place of fiber properties for suture applications. Dr. Brookstein opined that fiber properties differ from Dr. Mukherjee's cited molding compound properties, and it is improper to use nylon "molding compound" properties for nylon fiber properties absent some explanation as to why they apply (Ex. 6 at ¶¶57, 58). Thus, Dr. Mukherjee's opinion that TigerWire's nylon materially affects pliability based on molding compound properties has no scientific basis or valid methodology and fails *Daubert's* admissibility test. *Daubert*, 509 U.S. at 592-93; *Amorgianos v. Amtrak*, 303 F.3d 256, 268 (2nd Cir. 2002) (affirming exclusion of expert testimony where expert omitted relevant data in calculations).

4. Dr. Mukherjee's Opinion Regarding Nylon's Effects Is Not Based On A Reliable Methodology or Foundation

Once Dr. Mukherjee's tests and incorrect data are stripped away, Dr. Mukherjee's noninfringement TigerWire opinion rests solely on the following proposition -- "Mr. Benavitz also informed me that Arthrex has received customer feedback that TigerWire is more stiff than FiberWire" (Ex. 3 at 31). But Dr. Mukherjee's supposed opinion based on Mr. Benavitz'

⁴ Dr. Mukherjee's analysis is further flawed because even if it were proper to use molding compound properties, Dr. Mukherjee's data shows no significant difference because the flexural moduli of PET and nylon have extensive overlap (Ex. 3 at Ex. 26). According to Dr. Mukherjee's incorrect data, the flexural modulus of PET compounds range from 350,000 to 450,000 psi, and nylon's ranges from 410,000 to 470,000 psi. (*id.*). Dr. Mukherjee provides no explanation as to why changing one strand of PET to nylon would have a material effect when the properties are about the same, even under his incorrect data.

statements is inadmissible because Dr. Mukherjee testified that he did not rely on Mr. Benavitz's statements:

Q. Did anything you discussed with him form or impact your opinions at all?

A. No.

(Ex. 4 at 124:15-17).

Further, even if Dr. Mukherjee did rely on Mr. Benavitz's statements, his opinion should be excluded because his reliance on Mr. Benavitz's statements to the exclusion of other relevant evidence does not satisfy *Daubert's* requirement that expert opinions be based on a reliable foundation and FED. R. EVID. 702's requirement that expert opinions be based on "sufficient facts or data." *Daubert*, 509 U.S. at 589-590, 597; *Albert v. Warner-Lambert Co.*, 234 F. Supp. 2d 101, 104 (D. Mass 2002). Dr. Mukherjee's and Mr. Benavitz's conversation was less than 5 minutes and took place at a conference (Ex. 4 at 122:7-124:5). While supposedly relying on this conversation, Dr. Mukherjee ignored the most pertinent evidence on the issue -- whether substituting one nylon yarn for one PET yarn materially affects pliability -- which was Mr. Dreyfuss' testimony (Ex. 7; Ex. 4 at 134:3-24). Mr. Dreyfuss is Arthrex's engineering manager for its upper extremity products (Ex. 1 at 5:11-13). As Arthrex's Rule 30(b)(6) witness,⁵ Mr. Dreyfuss testified that TigerWire and FiberWire have essentially the same feel:

Q. Other than the visual distinction that you can see with the introduction of a nylon marking strand, does the nylon marking strand in TigerWire affect any other characteristic of the braided suture?

A. Yes.

Q. What is -- what?

A. *Minute differences in its feel and strength, characteristics.*

⁵ Ex. 1 at 8:16-9:5 (testifying as to Topic Nos. 1-3 in Mitek's Third Amended Notice, Ex. 8, which include, *inter alia*, design and development of TigerWire, the materials used in TigerWire, and the reasons for selecting TigerWire's materials and structure).

(Ex. 2 at 75:6-14). Mr. Dreyfuss further testified that TigerWire and FiberWire have “very similar knot strength, tensile strength, [and] *handleability*,”⁶ and are very similar in “*all of the characteristics that define FiberWire*” (*id.* at 76:2-5) (emphasis added). Because Dr. Mukherjee supposedly relies on Mr. Benavitz’s statements without considering Mr. Dreyfuss’ testimony and the proper material properties, his opinion fails to satisfy *Daubert*’s and FED. R. EVID. 702’s reliability requirements.

The nature of Mr. Benavitz’s “statements” highlight that they are an unreliable basis for Dr. Mukherjee’s opinion. Mr. Benavitz’s statements are:

- unidentified (statements from customers to him or other marketing persons and then to him);
- double or even triple hearsay;
- lack any supporting documentation; and
- not authenticated.

Dr. Mukherjee never analyzed the context of these statements, who actually made them, how many such statements were made, or anything about the statements. He makes no mention that he considered or relied on any documents regarding customer feedback about TigerWire’s stiffness. Arthrex did not even identify Mr. Benavitz in its Rule 26 Initial Disclosures as someone knowledgeable about the issues in this case, and he was never deposed. Mr. Benavitz’s self-serving statements first came to light in Dr. Mukherjee’s March expert report. Relying on only such unidentifiable, self-serving statements from Arthrex, ignoring Mr. Dreyfuss’ testimony, and relying on the wrong material property data to support noninfringement does not satisfy *Daubert*’s requirement that the opinion rest on a reliable foundation and FED. R. EVID. 702’s requirement that expert opinions be based on “sufficient facts or data.” *Celebrity Cruises*,

⁶ Arthrex asserts that pliability is included within handleability (Defendants’ Memorandum In Support of Defendant’s Arthrex, Inc.’s and Pearsalls, Ltd.’s Motion For Summary Judgment at 4).

Inc. v. Essef Corp., 434 F. Supp. 2d 169, 181 (S.D. N.Y. 2006) (excluding expert testimony that ignored relevant information and was not properly justified).

III. Conclusion

Defendants' contention interrogatory answers are inadmissible hearsay, incompetent evidence, and unqualified expert testimony. Therefore, defendants interrogatory responses (Arthrex SJ Opp. Exs. 14 and 15) and Arthrex's reliance on them in opposing Mitek's Summary Judgment motion (Arthrex SJ Opp. at 8-9; Arthrex Response to Mitek Facts 12, 16, 20, 21, 22, 34, 37, and 38) should be stricken.

Dr. Mukherjee's opinion with respect to TigerWire and pliability is based on tests that were not performed and an unreliable methodology. Accordingly, Arthrex's reliance on it in opposing Mitek's motion for summary judgment of infringement should be stricken, which includes striking:

- Arthrex's reliance on Dr. Mukherjee's opinions (Arthrex's SJ Opp. at 5, n.7);
- Arthrex's SJ Opp. Ex. 6 at 30-31; and
- Arthrex's Responses to Mitek Facts 40-45.

Date: September 15, 2006

DEPUY MITEK, INC.,
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CERTIFICATE OF SERVICE

I certify that I am counsel for DePuy Mitek, Inc. and that a true and correct copy of:

DePuy Mitek's Memorandum in Support of its Motion to Strike Arthrex's Reliance On Its Own Interrogatory Contentions and Dr. Mukherjee's TigerWire Opinions In Opposition to DePuy Mitek's Motion For Summary Judgment of Infringement and No Inequitable Conduct

was served on counsel for Defendants Arthrex, Inc. and Pearsalls Ltd. on this date via the Court's e-mail notification with the following recipients being listed as filing users for Defendants:

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Dated: September 15, 2006

/s/ Erich M. Falke
Erich M. Falke

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DePuy Mitek, Inc., a
Massachusetts Corporation,

Plaintiff,

vs.

CIVIL ACTION
NO. 04-12457 PBS

Arthrex, Inc., a Delaware
Corporation,

Defendant.

DEPOSITION OF:

PETER DREYFUSS

DATE:

September 16, 2005

TIME:

8:59 a.m. to 1:54 p.m.

LOCATION:

The Ritz Carlton Golf Resort
2600 Tiburon Drive
Naples, FL 34112

TAKEN BY:

Plaintiff

REPORTER:

Deborah A. Krotz, RPR, CRR

VIDEOGRAPHER:

Les Smoak, CLVS

<p>1 APPEARANCES: 2 For the Plaintiff: ERICH M. FALKE, ESQ. and ANGELA VERRECCHIO 3 Woodcock Washburn, LLP One Liberty Place, 46th Floor 4 Philadelphia, PA 19103 5 For the Defendant: SALVATORE P. TAMBURRO, ESQ. Dickstein, Shapiro, 6 Morin & Oshinsky, LLP 2101 L Street NW 7 Washington, DC 20037-1526 8 JOHN W. SCHMIEDING, ESQ. General Counsel 9 Arthrex, Inc. 1370 Creekside Boulevard Naples, FL 34108-1945</p>	<p>1 THE COURT REPORTER: This is the videotaped 2 deposition of Peter Dreyfuss taken by the plaintiff 3 in the case of DePuy Mitek, Inc. versus Arthrex, 4 Inc., Civil Action No. 04-12457 PBS. 5 We are at The Ritz-Carlton, 2600 Tiburon Drive, 6 Naples, Florida. Today is September 16th, 2005. The 7 time is now 8:59 a.m. 8 At this time, would counsel please -- Oh, I'm 9 sorry. 10 The videographer is Les Smoak. My name is Debbie 11 Krotz; I am the court reporter with the firm of Donovan 12 Court Reporting. 13 At this time, would counsel please state their 14 appearances for the record. 15 MR. FALKE: Erich Falke and Angie Verrecchio for 16 Plaintiff, DePuy Mitek. 17 MR. TAMBURRO: Sal Tamburo and John Schmieding for 18 Defendant, Arthrex, Inc. 19 THEREUPON, 20 PETER DREYFUSS, 21 a witness, having been first duly sworn, upon his oath, 22 testified as follows: 23 DIRECT EXAMINATION 24 BY FALKE: 25 Q. Good morning.</p>
<p>1 INDEX 2 WITNESS: PAGE: 3 PETER DREYFUSS 4 DIRECT EXAMINATION 4 BY FALKE: 5 6 EXHIBITS 7 8 EXHIBIT DESCRIPTION PAGE: 9 DePuy Mitek drawing by Peter Dreyfuss of 65 10 Exhibit No. 117 Twisting Process for Core Production of FiberWire 11 DePuy Mitek drawing of Peter Dreyfuss 71 12 Exhibit No. 118 Approximate Braiding Process 13 DePuy Mitek drawing of Peter Dreyfuss 76 14 Exhibit No. 119 Partial Schematic of 8-carrier Braiding Machine 15 DePuy Mitek drawing of Peter Dreyfuss of 91 16 Exhibit No. 120 Coating Process Schematic 17 DePuy Mitek drawing of Peter Dreyfuss of 97 18 Exhibit No. 121 the Approximate Cross-Section of Arthrex 2-0 FiberWire 19 DePuy Mitek drawing of Peter Dreyfuss of 100 20 Exhibit No. 122 the Approximate Cross-Section of No. 2 FiberWire 21 DePuy Mitek drawing of Peter Dreyfuss of 103 22 Exhibit No. 123 the Approximate Cross-Section of Size 0 FiberWire 23 DePuy Mitek drawing of Peter Dreyfuss of 103 24 Exhibit No. 124 the Approximate Cross-Section of Size 3-0 FiberWire 25 DePuy Mitek drawing of Peter Dreyfuss of 104 Exhibit No. 125 the Approximate Cross-Section of Size 4-0 FiberWire DePuy Mitek drawing of Peter Dreyfuss of 106 Exhibit No. 126 the Approximate Cross-Section of Size 2 TigerWire DePuy Mitek Technical File Arthrex 107 24 Exhibit No. 127 FiberWire Volume 2 DePuy Mitek drawing of Peter Dreyfuss of 110 25 Exhibit No. 128 the Approximate Cross-Section of 2mm FiberTape</p>	<p>1 A. Good morning. 2 Q. Could you please state your name for the record. 3 A. Peter Dreyfuss. 4 Q. Could you also state your address for the record, 5 please. 6 A. 2417 Kings Lake Boulevard, Naples, Florida. 7 Q. Are you currently employed, Mr. Dreyfuss? 8 A. Yes, I am. 9 Q. And who are you employed with? 10 A. Arthrex. 11 Q. And what is your position at Arthrex? 12 A. I'm the Engineering Manager for Upper Extremity 13 Products. 14 Q. Have you ever been deposed, Mr. Dreyfuss? 15 A. No, I have not. 16 Q. I'm just going to go over a few of the ground 17 rules just so we're all on the same page. You've taken an 18 oath to answer the questions truthfully; do you understand 19 that? 20 A. Yes. 21 Q. And if you could answer all my questions verbally 22 rather than maybe a shake of the head or a nod of the 23 head; that way, the Court reporter can take down what you 24 say -- excuse me -- as opposed to your actions. 25 A. Yes.</p>

2 (Pages 2 to 5)

<p>6</p> <p>1 Q. Okay. Do you understand today that you're here</p> <p>2 to testify on behalf of Arthrex as a corporation as</p> <p>3 opposed to Peter Dreyfuss, individually?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Is there any reason today you can think of</p> <p>6 why you can't give honest testimony?</p> <p>7 A. No.</p> <p>8 Q. Also, throughout the day, we'll be taking breaks,</p> <p>9 generally about once every hour, but if there's some point</p> <p>10 between an hour period that you need to take a break,</p> <p>11 please feel free to say you need to take a break, and</p> <p>12 we'll try to accommodate you as soon as we can.</p> <p>13 A. Thanks.</p> <p>14 Q. Okay. What did you do to prepare for today's</p> <p>15 deposition?</p> <p>16 A. I reviewed the designership files for the</p> <p>17 FiberWire product. I met with John and Sal and a few</p> <p>18 other people at Arthrex to refresh topic memory.</p> <p>19 I attempted to contact Don Grafton on several</p> <p>20 phone calls, and I was unable to get through to him.</p> <p>21 Q. You mentioned that you met with John Schmieding</p> <p>22 right?</p> <p>23 A. Yes.</p> <p>24 Q. And Sal Tamburo?</p> <p>25 A. Yes.</p>	<p>8</p> <p>1 A. One was a meeting that she was in with John and</p> <p>2 Sal and the other --</p> <p>3 MR. TAMBURO: Chuck Saber.</p> <p>4 A. -- Chuck Saber. The meeting was approximately</p> <p>5 two -- two to three hours.</p> <p>6 Q. Okay.</p> <p>7 A. And then I spoke with her for about 20 minutes</p> <p>8 subsequent to that.</p> <p>9 Q. Okay. I'd like to show you Exhibit 100 which is</p> <p>10 in front of you. It's DePuy Mitek's Third Amended Notice</p> <p>11 of Deposition of Arthrex, Inc. Have you seen Exhibit 100</p> <p>12 before?</p> <p>13 A. This?</p> <p>14 Q. Yes.</p> <p>15 A. No, I haven't.</p> <p>16 Q. Okay. If you turn to Page 4 of Exhibit 100, do</p> <p>17 you understand that you're here to testify today on behalf</p> <p>18 of the corporation Arthrex with respect to Topics 1, 2,</p> <p>19 and 3 on Page 4 of Exhibit 100?</p> <p>20 A. Yes. I have seen this -- this page of the</p> <p>21 document before.</p> <p>22 Q. You've seen this page but not --</p> <p>23 A. Right.</p> <p>24 Q. Okay. But you understand that you're here to</p> <p>25 testify on behalf of Arthrex for Topics 1, 2, and 3 of</p>
<p>7</p> <p>1 Q. And you also mentioned others. What others did</p> <p>2 you meet with to prepare for today's deposition?</p> <p>3 A. Tara Schaneville. She's an engineer at Arthrex,</p> <p>4 and she's our -- she's new. She's our textiles expert.</p> <p>5 Q. Okay. And what was her name? Tara?</p> <p>6 A. Tara, Tara. She's Tara Schaneville.</p> <p>7 Q. Schaneville?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And also, one other thing for background,</p> <p>10 if -- there are going to be questions that I ask you that</p> <p>11 you're going to be able to anticipate the end of my</p> <p>12 question by what I say at the beginning of the question.</p> <p>13 If you could just pause and wait until I finish the</p> <p>14 question before answering, it'll help the court reporter</p> <p>15 make a clean transcript. And also, it'll give your</p> <p>16 counsel an opportunity to object to my questions. But if</p> <p>17 he does object, you still have an obligation to answer the</p> <p>18 question unless he instructs you not to answer based on</p> <p>19 a few different grounds; do you understand that?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. On how many occasions did you meet with</p> <p>22 Tara, John, Sal to prepare for today's deposition?</p> <p>23 A. With Tara, two occasions, specifically for this</p> <p>24 deposition.</p> <p>25 Q. And how long were those two occasions?</p>	<p>9</p> <p>1 this notice?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And do you feel that you are knowledgeable</p> <p>4 to discuss Topic 1 of Exhibit 100?</p> <p>5 A. Yes.</p> <p>6 Q. Do you feel that you are the most knowledgeable</p> <p>7 person at Arthrex to testify on behalf of Topic No. 1 in</p> <p>8 Exhibit 100?</p> <p>9 A. Yes.</p> <p>10 Q. Do you feel knowledgeable about testifying to</p> <p>11 Topic No. 2 in Exhibit 100?</p> <p>12 A. Yes.</p> <p>13 Q. Do you feel that you're the most knowledgeable at</p> <p>14 Arthrex, the testimony related to Topic No. 2 in</p> <p>15 Exhibit 100?</p> <p>16 A. No. Possibly.</p> <p>17 Q. Who might, other than you, at Arthrex be the most</p> <p>18 knowledgeable to discuss Topic No. 2 in Exhibit 100?</p> <p>19 A. Tara Schaneville.</p> <p>20 Q. And Topic No. 3, do you feel you're knowledgeable</p> <p>21 to talk about Topic No. 3 in Exhibit 100?</p> <p>22 A. Yes.</p> <p>23 Q. Do you feel you're the most qualified person at</p> <p>24 Arthrex to testify in response to Topic No. 3 in</p> <p>25 Exhibit 100?</p>

<p style="text-align: right;">30</p> <p>1 A. Yes.</p> <p>2 Q. Is it true then that the No. 2 FiberWire used in</p> <p>3 AR-7201 has the same braiding as any Arthrex product that</p> <p>4 has a No. 5 FiberWire in it?</p> <p>5 A. Yes.</p> <p>6 Q. Is it true then that the No. 2 FiberWire used in</p> <p>7 AR-7201 has the same braiding as any Arthrex product that</p> <p>8 has a No. 2-0 FiberWire in it?</p> <p>9 A. Yes.</p> <p>10 Q. Is it true then that the No. 2 FiberWire used in</p> <p>11 AR-7201 has the same braiding as any Arthrex product that</p> <p>12 has a 0 FiberWire in it?</p> <p>13 A. I believe so.</p> <p>14 Q. Is it true then that the No. 2 FiberWire used in</p> <p>15 AR-7201 has the same braiding as any Arthrex product that</p> <p>16 has a 2 -- Strike that. Let me rephrase that.</p> <p>17 Is it true then that the No. 2 FiberWire used in</p> <p>18 AR-7201 has the same braiding as any Arthrex product that</p> <p>19 has a 3-0 FiberWire in it?</p> <p>20 A. I don't know.</p> <p>21 Q. And who would know that?</p> <p>22 A. Tara Schaneville.</p> <p>23 Q. Okay. Is it true then that the No. 2 FiberWire</p> <p>24 used in AR-7201 has the same braiding as any Arthrex</p> <p>25 product that has a 4-0 FiberWire used in it?</p>	<p style="text-align: right;">32</p> <p>1 FiberWire?</p> <p>2 A. The braid, no.</p> <p>3 Q. Are the materials used in any Arthrex TigerWire</p> <p>4 different than the braid -- than the materials used in</p> <p>5 Arthrex's No. 2 FiberWire?</p> <p>6 MR. TAMBURIO: Object to the form.</p> <p>7 A. Yes.</p> <p>8 Q. And how are they different?</p> <p>9 A. There is a strand -- one carrier of PET is</p> <p>10 replaced by one carrier of nylon.</p> <p>11 Q. Is that only difference in the braid between</p> <p>12 Arthrex's TigerWire products of any size and Arthrex's No.</p> <p>13 2 FiberWire?</p> <p>14 A. Yes.</p> <p>15 Q. So the coating is the same; is that right?</p> <p>16 A. Yes.</p> <p>17 Q. And the coating used on all Arthrex FiberWire</p> <p>18 products, TigerWire products is MED-2174; right?</p> <p>19 A. Yes.</p> <p>20 Q. Has any other coating been used by Arthrex at any</p> <p>21 time to coat any of Arthrex's FiberWire products or</p> <p>22 TigerWire products?</p> <p>23 A. No.</p> <p>24 MR. FALKE: Sal, during the course of the break,</p> <p>25 do you think you could try to contact Tara Schaneville</p>
<p style="text-align: right;">31</p> <p>1 A. I don't know.</p> <p>2 Q. And Tara would also know that?</p> <p>3 A. Correct.</p> <p>4 Q. Okay. Other than the No. 2, 5, 0, 2-0, 3-0, and</p> <p>5 4-0, are there any other size FiberWires sold by Arthrex?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. What other sizes of FiberWire other than</p> <p>8 2, 5, 0, 0-2, 0-3 -- Yeah, strike that.</p> <p>9 What other sizes other than 5, 2, 0, 2-0, 3-0,</p> <p>10 and 4-0 are sold by Arthrex?</p> <p>11 A. A FiberTape.</p> <p>12 Q. Okay. Anything else?</p> <p>13 A. No.</p> <p>14 Q. And is the braid of TigerWire different than the</p> <p>15 braid used in the No. 2 FiberWire?</p> <p>16 MR. TAMBURIO: Object to the form.</p> <p>17 Q. Do you understand the question?</p> <p>18 A. Yes.</p> <p>19 Q. Okay.</p> <p>20 A. Yes.</p> <p>21 Q. They are different?</p> <p>22 A. The braid in -- I'm sorry. Please rephrase or</p> <p>23 repeat.</p> <p>24 Q. Sure. Sure. Is the braid in any Arthrex</p> <p>25 TigerWire different than the braid used in Arthrex's No. 2</p>	<p style="text-align: right;">33</p> <p>1 to try to find the answer to I think the three</p> <p>2 questions of 2-0, 3-0 --</p> <p>3 MS. VERRECCHIO: No, not 2-0.</p> <p>4 MR. FALKE: Not 2-0. Right. 3-0, 4-0, and 0</p> <p>5 just to find out if the braid used in those sizes is</p> <p>6 the same as No. 2.</p> <p>7 MR. TAMBURIO: The same as No. 2?</p> <p>8 MR. FALKE: Right.</p> <p>9 MR. TAMBURIO: Sure.</p> <p>10 MR. FALKE: Thanks.</p> <p>11 Why don't we -- Can we take a break now and try</p> <p>12 to find out, because that will help out.</p> <p>13 MR. TAMBURIO: Sure.</p> <p>14 VIDEOGRAPHER: Going off the record. We're off</p> <p>15 (A short break was held from 9:46 a.m. to 9:58</p> <p>16 a.m.)</p> <p>17 VIDEOGRAPHER: Back on the record.</p> <p>18 BY MR. FALKE:</p> <p>19 Q. Over the break, did you have a chance to talk to</p> <p>20 Tara Schaneville?</p> <p>21 A. Yes.</p> <p>22 Q. Is the No. 0 FiberWire constructed -- Strike</p> <p>23 that.</p> <p>24 Is the No. 0 FiberWire braided the same as as</p> <p>25 the No. 2 FiberWire in AR-7201?</p>

<p style="text-align: right;">78</p> <p>1 I like the carriers alternate between ultra high molecular 2 weight polyethylene and PET; is that right? 3 A. Yes, to my knowledge. 4 Q. Okay. Good. I think we're finished with that 5 for now. Could you initial and date that, please. 6 And maybe, if it's correct, label that with 7 Arthrex FiberWire 2-0, 3-0, and 4-0. And if you want to 8 put behind the 4-0 no core, that would be great, if it's 9 accurate. 10 Okay. Now can we try to draw the braiding for 11 Arthrex's No. 0 FiberWire suture that has 12 carriers? 12 I think ultimately what I'm trying to get at is I 13 understand that with the eight-carrier braid of 2-0, 3-0, 14 and 4-0 FiberWire, the carriers alternate, PET, ultra high 15 molecular weight polyethylene, PET, and so on and so 16 forth? 17 A. Yes. 18 Q. Is that alternating configuration the same for 19 the braiding used with 12 carriers on the No. 0 FiberWire 20 suture? 21 A. Yes. 22 Q. Okay. And is that alternating configuration of 23 PET and ultra high molecular weight polyethylene the same 24 for the 16-carrier braid of Arthrex's No. 2 FiberWire 25 suture?</p>	<p style="text-align: right;">80</p> <p>1 between the Arthrex TigerWire sutures and the Arthrex 2 FiberWire -- No. 2 FiberWire sutures? 3 A. One carrier of PET is replaced with a -- one yarn 4 of PET is replaced with a yarn of nylon. 5 Q. And what type of nylon is used in Arthrex's 6 TigerWire and TigerTail products? 7 A. I'm not sure. 8 Q. Okay. Okay. 9 Okay. I think we've been talking about the ARM 10 8784 braiding process; is that right? 11 A. Correct. 12 Q. And other than the FiberTape, have we already 13 discussed the braiding process for every other Arthrex 14 FiberWire suture? 15 A. Yes. 16 Q. Okay. Okay. Then after we have done the 17 braiding on ARM 8784, as I understand this, the sutures 18 are coming out the top, out of the page; right? 19 A. (Witness nods head affirmatively). 20 Q. And the middle of the core, for those FiberWire 21 sutures that have a core, the core comes straight up, and 22 then these carriers kind of form like a cone coming out; 23 right? 24 A. Correct. 25 Q. And it's pulled out, and then we have the maypole</p>
<p style="text-align: right;">79</p> <p>1 A. Yes. 2 Q. Okay. So there's never an instance then in any 3 manufacture of any Arthrex FiberWire suture where two 4 carriers next to each other are the same material; is that 5 right? 6 A. I believe so. 7 Q. Okay. So it's never like four carriers of PET, 8 then four carriers of PET, and then carriers of -- you 9 know -- so on? 10 A. I -- I believe so. 11 Q. Okay. Okay. How many carriers are used in the 12 manufacturing of Arthrex's TigerWire sutures? And that 13 includes TigerTail, as well. 14 A. Sixteen. 15 Q. Sixteen? 16 A. (Witness nods head affirmatively). 17 Q. Okay. And how is -- Is the carrier configuration 18 any different in the braiding and manufacturing of the No. 19 2 TigerWire versus the No. 2 FiberWire? 20 A. No. Configuration? 21 Q. Right. 22 A. No. 23 Q. Okay. Okay. But how are they different then? 24 A. Material. 25 Q. Right. In what way are the materials different</p>	<p style="text-align: right;">81</p> <p>1 effect? 2 A. Correct. 3 Q. Do you know how fast the -- or at what speed the 4 yarn is being or the suture is being braided? 5 A. It's quite slow. It would be maybe -- maybe like 6 1 to 2 feet per minute. Maybe a little more, but slow 7 would be a term. 8 Q. Okay. And then if we go down to the next step on 9 ARM 8784, it says wind to skein. 10 A. Skein. 11 Q. Do you know what that means? 12 A. I assume it's some sort of a -- another term for 13 a different spool of some sort. 14 Q. Okay. So as the suture -- the braided suture 15 comes out of the braiding process, it's wound around 16 another spool? 17 A. A takeup, yes, part or piece. 18 Q. As we talked about the braiding process so far in 19 the use of ultra high molecular weight polyethylene and 20 PET, are those materials different colors with respect to 21 any of the FiberWire sutures? 22 A. I'm sorry. Say it again. 23 Q. Sure. I'm wondering what color are the yarns 24 made of the ultra high molecular weight polyethylene and 25 the PET?</p>

<p>106</p> <p>1 Q. Okay. Now what I'd like you to draw is a</p> <p>2 cross-section of Arthrex's TigerWire suture.</p> <p>3 A. Okay. Which size? Actually, there's --</p> <p>4 Q. That's a good question. How many sizes of</p> <p>5 TigerWire are there?</p> <p>6 A. No, technically, there's only one.</p> <p>7 Q. Okay. Is that a No. 2 size?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. So just to rephrase, can you please draw a</p> <p>10 No. 2 TigerWire as sold by Arthrex?</p> <p>11 A. (Witness complying).</p> <p>12 Q. And I'm going to mark your drawing of No. 2</p> <p>13 TigerWire as sold by Arthrex with DePuy Mitek Exhibit 126</p> <p>14 (DePuy Mitek Exhibit No. 126, drawing of Peter</p> <p>15 Dreyfuss of the Approximate Cross-Section of Size 2</p> <p>16 TigerWire, was marked for identification.)</p> <p>17 Q. Do you know how many carriers are in the Arthrex</p> <p>18 No. 2 TigerWire?</p> <p>19 A. Sixteen.</p> <p>20 Q. Sixteen. So the configuration of the sheath or</p> <p>21 cover in Arthrex's No. 2 TigerWire is exactly the same as</p> <p>22 the sheath or cover as Arthrex's No. 2 FiberWire with the</p> <p>23 exception that one of the PET carriers has been replaced</p> <p>24 with a black nylon carrier?</p> <p>25 A. Correct.</p>	<p>108</p> <p>1 A. Not to my knowledge, no. Not ...</p> <p>2 Q. If you could turn to Page ARM 9003. Now you can</p> <p>3 -- I'm sorry; it's the page before also, ARM 9002.</p> <p>4 I'm going to ask the question again. If you need</p> <p>5 to reference this page, go right ahead. Can you explain</p> <p>6 to me the process that Pearsalls goes through to</p> <p>7 manufacture Arthrex's FiberTape?</p> <p>8 A. In short, a tape component is -- They use the --</p> <p>9 a braiding machine. But the carriers are configured in</p> <p>10 such a way that the braids don't -- the ends of the</p> <p>11 carriers don't actually cross, and, therefore, it's an</p> <p>12 open braid which, when it's taken up on the takeup spool</p> <p>13 it flattens out, makes a tape. That tape is then</p> <p>14 incorporated -- stitched into a piece of FiberWire suture</p> <p>15 along its length with a length of -- the length of</p> <p>16 FiberWires on the ends which have no tape. The middle</p> <p>17 portion of the construct is FiberWire and FiberTape</p> <p>18 interstitched, and the ends and the FiberTape ends within</p> <p>19 the FiberWire, and then there's ends of FiberWire outside</p> <p>20 of that.</p> <p>21 Q. Okay. So does Arthrex's FiberTape include an</p> <p>22 Arthrex No. 2 FiberWire suture?</p> <p>23 A. Yes.</p> <p>24 Q. And does it include the Arthrex FiberWire No. 2</p> <p>25 suture as depicted in Exhibit 122?</p>
<p>107</p> <p>1 Q. Okay. So the sheath has alternating yarns made</p> <p>2 up of ultra high molecular weight and polyester or PET</p> <p>3 with the exception of one carrier that is black nylon?</p> <p>4 A. Correct.</p> <p>5 Q. Okay. And the adjacent yarns in the sheath are</p> <p>6 in contact with each other in the same intertwining manner</p> <p>7 as Exhibits 125, 124, 123, 122, and 121?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. All right. Thank you.</p> <p>10 Okay. Now I'd like to talk about FiberTape.</p> <p>11 Could you explain to me the process that Pearsalls goes</p> <p>12 through to manufacture FiberTape from the stage of</p> <p>13 individual yarns?</p> <p>14 Actually -- Do you know what? I might have a</p> <p>15 document here that would help you out.</p> <p>16 I'm going to show you what's being marked as</p> <p>17 DePuy Mitek Exhibit 127. It's a document with Bates</p> <p>18 numbers ARM 8847 through 9091.</p> <p>19 One is double-sided; one isn't. That one goes to</p> <p>20 Sal. No. I'm sorry. That one goes to Sal.</p> <p>21 Okay. We're talking about Exhibit No. 127.</p> <p>22 (DePuy Mitek Exhibit No. 127, Technical File</p> <p>23 Arthrex FiberWire Volume 2, was marked for</p> <p>24 identification.)</p> <p>25 Q. Have you seen Exhibit 127 before?</p>	<p>109</p> <p>1 A. Yes.</p> <p>2 Q. Can you just draw for me, please, the</p> <p>3 cross-section of an Arthrex FiberWire Tape as --</p> <p>4 A. Can I -- May I simplify it? Representative of</p> <p>5 FiberWire and tape without all ...</p> <p>6 Q. Sure. You can start about that, and if I'm</p> <p>7 confused or need more, then I'll let you know. But you</p> <p>8 can start with that.</p> <p>9 MR. TAMBURIO: I'm going to object to this line of</p> <p>10 questioning regarding FiberTape as outside the scope</p> <p>11 of the notice, which seems to be limited to FiberWire</p> <p>12 sutures.</p> <p>13 MR. FALKE: Well ... I think we defined in our</p> <p>14 first set of either documentary requests or</p> <p>15 Interrogatories as FiberWire including FiberWire or</p> <p>16 any product that includes FiberWire, but your</p> <p>17 objection is -- you know -- it's your objection.</p> <p>18 MR. TAMBURIO: I thought I heard a different</p> <p>19 definition today of FiberWire suture that would not</p> <p>20 include FiberWire Tape.</p> <p>21 MR. FALKE: Right. But I think the notice was</p> <p>22 probably using the definitions of the other discovery,</p> <p>23 not necessarily definitions of mine, but --</p> <p>24 MR. TAMBURIO: Fine. I just wanted to note my</p> <p>25 objection.</p>

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DePuy Mitek, Inc., a
Massachusetts Corporation,

Plaintiff,

vs.

CIVIL ACTION
NO. 04-12457 PBS

Arthrex, Inc., a Delaware
Corporation,

Defendant.

CONTINUATION

DEPOSITION OF: PETER DREYFUSS

DATE: December 7, 2005

TIME: 8:03 a.m. to 1:21 p.m.

LOCATION: The Staybridge Suites
4805 Tamiami Trail North
Naples, FL

TAKEN BY: Plaintiff

REPORTER: Deborah A. Krotz, RPR, CRR

VIDEOGRAPHER: Michael Sturdevant, CLVS

<p style="text-align: right;">74</p> <p>1 Q. And if you see in the second paragraph, second 2 sentence, it says, "The Black/White Suture commonly known 3 as TigerWire has a blend of nylon and the ultra high 4 molecular weight polyethylene." Do you see that? 5 A. Yes. 6 Q. And if you skip a sentence, it says, "In place of 7 the nylon, a silk suture will be used." Do you see that? 8 A. Yes, I do. 9 Q. Is the only difference between Arthrex's 10 TigerWire and Arthrex's FiberWire with silk is the silk 11 suture is used in place of the nylon marker strand in 12 Arthrex's TigerWire product; is that right? 13 MR. SABER: Object; vague and confusing question. 14 Q. Do you understand the question? 15 A. I understand, I believe, from what I read here 16 that that is true. 17 Q. And the last time we were here, you described the 18 design and construction of the TigerWire product. Do you 19 remember that? 20 A. Yes, I understand that. 21 Q. What is the purpose of the nylon marking strand 22 in Arthrex's TigerWire product? 23 A. Identification. Visual identification. 24 Q. Is there any other purpose to the nylon marking 25 strand in Arthrex's TigerWire product?</p>	<p style="text-align: right;">76</p> <p>1 Q. But they show -- But a No. 2 TigerWire, for 2 instance, and a No. 2 FiberWire show very similar knot 3 strength, tensile strength, handleability, and what not, 4 all of the characteristics that define FiberWire? 5 A. I believe so. 6 Q. Okay. And is that true also with the 7 introduction of silk rather than a nylon marker? 8 A. I don't know. 9 Q. Do you know whether the silk used in the 10 FiberWire with silk suture affects any of the 11 characteristics of the suture? 12 A. No, I don't. 13 Q. Based on your understanding of Arthrex's 14 FiberWire with silk product, do you think you would be 15 able to draw a cross-section of the suture? 16 A. I -- No. 17 Q. No? But as far as you know, the only difference 18 between the TigerWire and a FiberWire with silk is instead 19 of the nylon, it's a piece of silk? 20 A. That would be a good generalization. 21 Q. Okay. And Don Grafton would know this 22 information? 23 A. I believe so, yes. 24 (DePuy Mitek Exhibit No. 142, Design History File 25 for FiberWire 3-0 and 4-0, ARM 6580 through 6950, was</p>
<p style="text-align: right;">75</p> <p>1 A. That's the primary purpose. I'm not sure if 2 there's secondary purposes, per se. 3 Q. Does the introduction of a nylon marking strand 4 in the TigerWire product affect any of the physical 5 characteristics of the TigerWire product? 6 A. Affect in -- 7 Q. Other than the visual distinction that you can 8 see with the introduction of a nylon marking strand, does 9 the nylon marking strand in TigerWire affect any other 10 characteristic of the braided suture? 11 A. Yes. 12 Q. What is -- what? 13 A. Minute differences in its feel and strength, 14 characteristics. 15 Q. But you would describe them as minute 16 differences? 17 A. Not enough to cause it not to become a product. 18 Q. Can you explain that? 19 A. It's -- 20 Q. In other words, the introduction of the nylon 21 marking strand doesn't affect any of the marketing 22 qualities or engineering qualities that make FiberWire 23 FiberWire; does that make sense? 24 MR. SABER: Objection; vague. 25 A. It -- They are comparable.</p>	<p style="text-align: right;">77</p> <p>1 marked for identification.) 2 Q. I'm going to hand you a document labeled DePuy 3 Mitek Exhibit 142. It's a document with Bates numbers ARM 4 6580 through 6950. 5 Have you seen Exhibit 142 before? 6 A. I believe so. 7 Q. And what is DePuy Mitek Exhibit 142? 8 A. The Design History File for FiberWire new sizes 9 -- new sizes of FiberWire. 10 Q. And what new sizes for FiberWire? 11 A. 3-0 and 4-0. 12 Q. Do you have any reason to believe the information 13 in Exhibit 142 is inaccurate? 14 MR. SABER: Objection; overbroad. 15 A. No, I don't. 16 MR. FALKE: I'm just trying to authenticate the 17 document. 18 MR. SABER: No, I have no problem with you 19 authenticating the document, but I -- you know -- this 20 is, again, a document of hundreds of pages. And to 21 ask him to -- a generalized question like that I think 22 is kind of unfair. 23 BY MR. FALKE: 24 Q. Do the instructions for use that are included 25 with all of Arthrex's FiberWire product indicate that the</p>

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DePuy Mitek, Inc.
a Massachusetts Corporation

Plaintiff,

v.

Arthrex, Inc.
a Delaware Corporation

Defendant.

Civil Action No. 04-12457 PBS

RESPONSIVE EXPERT REPORT OF DR. DEBI PRASAD MUKHERJEE
CONCERNING NON-INFRINGEMENT OF U.S. PATENT NO. 5,314,446
AND OTHER MATTERS

Pursuant to the provisions of Rule 26(a)(2) of the Federal Rules of Civil Procedure, the Joint Case Management Statement adopted by the Court on February 18, 2005, and agreement between the parties, the undersigned, Dr. Debi Prasad Mukherjee, an expert witness for Defendants Arthrex, Inc. and Pearsalls, Limited (together, "Defendants") hereby sets forth his responsive expert report concerning non-infringement and other matters as follows.

demonstrating that the coating materially affects FiberWire's pliability/bendability. Ex. 20 at 3-4.

In addition, I conducted my own subjective "drape test" on samples of coated and uncoated FiberWire suture to determine the coating's effect on the pliability of the suture. The drape test involves draping the suture over my extended index finger and observing the degree to which the suture conforms to the shape of my finger. The results of my test showed that the coated FiberWire suture conformed to the shape of my index finger to a much greater degree than did the uncoated FiberWire suture, confirming that the coating materially affects FiberWire's pliability.

Further, Dr. Robert Burks performed a subjective tactile feel and knot tiedown analysis on coated and uncoated FiberWire suture. The results of his observations (Ex. 21) provide further support that the coating applied to FiberWire materially affects these handling properties. For example, Dr. Burks – not knowing which suture sample was coated and which was uncoated – consistently selected the coated sample as having better tactile feel as well as better tie-down performance.

Therefore, for the reasons explained above, it is my opinion the coating applied to the FiberWire suture materially affects the above-described handleability and pliability characteristics of FiberWire.

2. Coating materially affects FiberWire's knot security and knot strength

Based on my review of the three micrographs, it appears that they are very different and that they are too unclear to draw any conclusions from them. Despite the lack of clarity, however, it appears that the individual braid filaments are grouped together to a much greater degree in the Tab G micrograph than they are in the Tab E micrograph. This is an indication that coating has permeated into the braid.

In any event, Dr. Brookstein's conclusions are inconsistent with the findings discussed below. In addition to the tests described above, CETR also conducted a scanning electron microscopy (SEM) examination of coated and uncoated FiberWire suture. My review of the scans performed to date appears to indicate that the coating does extend into the braid. Ex. 20 at Fig. 14. This is consistent with the effect coating has on FiberWire's pliability, as described above.

F. The nylon added to TigerWire suture materially affects its pliability

I understand that Arthrex's TigerWire suture has the same construction as FiberWire suture except that one of the PET carriers is replaced with nylon 6,6. All the reasons discussed in connection with FiberWire also apply to TigerWire. Further, it is well known in the art of manufacturing and/or processing of fibers that nylon 6,6 fibers of the type used in TigerWire are generally more stiff (i.e., less pliable) than fibers made of PET, as used in FiberWire and TigerWire. Ex. 26. Therefore, the act of removing one PET carrier and replacing it with a nylon 6,6 carrier during the braiding process, as is done with TigerWire, introduces a less pliable material into the composite braid.

It is also my understanding from discussions with Bill Benavitz of Arthrex that the diameter of the nylon 6,6 fibers used in TigerWire is greater than that of the PET which it replaces. Therefore, the nylon 6,6 fiber makes up a greater percentage of the braid cross-section area than does the PET fiber it replaces. Mr. Benavitz also informed me that Arthrex has received customer feedback that TigerWire is more stiff than FiberWire. In addition, I held a sample of both commercial FiberWire and TigerWire and the TigerWire felt stiffer and more course than the same sized FiberWire. I also conducted the drape test on the two samples and found that the FiberWire conformed to the shape of my finger to a much greater degree than the TigerWire, indicating that the addition of the nylon appears to make TigerWire stiffer and less pliable. For these reasons, it is my opinion that the addition of nylon 6,6 in TigerWire materially affects its pliability. Moreover, the course feel would suggest that the addition of the nylon would adversely affect knot tie-down.

Dr. Brookstein stated that the purpose of the nylon included in TigerWire is for visual identification, and refers to Peter Dreyfuss's testimony to support his opinion. Brookstein Report at ¶ 46. Whether or not Dr. Brookstein's report is accurate, it does not change the fact that, as explained above, the addition of nylon materially affects TigerWire's pliability.

- G. Adding an adhesive to FiberStick suture materially affects its handleability

MUKHERJEE RESPONSIVE REPORT EXHIBIT 26

Properties

Polyethylene Terephthalate /PET Unfilled

Topics Index

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Values are from Modern Plastics Encyclopedia 99.

To jump to a particular property, click on the name listed below.

[Melt Flow](#)

[Melting Temperature](#)

[Glass Transition](#)

[Processing Molding Pressure](#)

[Processing Molding Temperature](#)

[Compression Ratio](#)

[Mold Shrinkage](#)

[Tensile Strength](#)

[Elongation](#)

[Tensile Yield Strength](#)

[Compressive Strength](#)

[Flexural Strength](#)

[Tensile Modulus](#)

[Flexural Modulus](#)

[Izod Impact Strength](#)

[Hardness](#)

[Deflection Temperature](#)

[Thermal Expansion](#)

[Thermal Conductivity](#)

[Specific Gravity](#)

[Dielectric Strength](#)

[Water Absorption](#)

Note: The ASTM numbers are linked to their descriptions on the ASTM website.

To go to the description, simply click on the ASTM number

[Melt Flow](#)

[ASTM D1238](#)

(gm/10 min)

--- gm /10 min

[Melting Temperature](#) degrees C

Tm Crystalline

212 to 265 C

To go back to contents,

click on

[Contents](#)

[Glass Transition \(C\)](#)

Tg (Amorphous)

68 to 80 C

[Processing Temperature Range](#) Degrees F

Extrusion

440 to 660 F for injection molding

click on
[Modulus](#)

Compressive Modulus (psi)
[ASTM D695](#)

--- **psi**
--- **GPa**

To go back to contents,
click on
[Contents](#)

Flexural Modulus (psi)
[ASTM D790](#)

At 73 F
350000 to 450000 psi
2.3 to 3.0 GPa

At 200 F

--- **psi**
--- **GPa**

At 250 F

--- **psi**
--- **GPa**

At 300 F

--- **psi**
--- **GPa**

Izod Impact (ft-lb/in of notch)
[ASTM D256](#)

0.25 to 0.7 ft lb/in of notch

To go back to contents,
click on
[Contents](#)

Hardness
[Rockwell ASTM D785](#)

M94-101; R111

--
Shore D65 [ASTM D2240/D2583](#)

Coefficient of Linear Thermal Expansion

65 (10 x exp -6) in/in /C
0.000 065 in/in /C

Deflection Temperature under flexural load (F)
[ASTM D648](#)

264 psi ---

70 to 150 F

66 psi ---

167 F

To go back to contents,
click on
[Contents](#)

Properties

Nylon 66 Molding Compound

Topics Index

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Values are from Modern Plastics Encyclopedia 99.

To jump to a particular property, click on the name listed below.

[Melt Flow](#)

[Melting Temperature](#)

[Glass Transition](#)

[Injection Molding Pressure](#)

[Injection Molding Temperature](#)

[Compression Ratio](#)

[Mold Shrinkage](#)

[Tensile Strength](#)

[Elongation](#)

[Tensile Yield Strength](#)

[Compressive Strength](#)

[Flexural Strength](#)

[Tensile Modulus](#)

[Flexural Modulus](#)

[Izod Impact Strength](#)

[Hardness](#)

[Deflection Temperature](#)

[Thermal Expansion](#)

[Thermal Conductivity](#)

[Specific Gravity](#)

[Dielectric Strength](#)

17 900 psi
Conditioned with 50% relative humidity
6 100 psi

Tensile Modulus (psi)
ASTM D638

Dry as molded (about 0.2% moisture content)
230 000 to 550 000 psi
Conditioned with 50% relative humidity
230 000 to 500 000 psi

To go to Modulus Values,
click on
[Modulus](#)

Compressive Modulus (psi)
ASTM D695

--- psi

Flexural Modulus (psi)
ASTM D790

At 73 F

Dry as molded (about 0.2% moisture content)
410 000 to 470 000 psi
Conditioned with 50% relative humidity
185 000 psi

To go to Modulus Values,
click on
[Modulus](#)

Izod Impact (ft-lb/in of notch)
ASTM D256A

Dry as molded (about 0.2% moisture content)
0.55 to 10 ft lb/in of notch
Conditioned with 50% relative humidity
0.85 to 2.1 ft-lb/in of notch

Hardness
Rockwell ASTM D785

Dry as molded (about 0.2% moisture content)
R120 M83
Conditioned with 50% relative humidity
M95 to M105

Coefficient of Linear Thermal Expansion
(10 exp-6)in/in/C

80 (10 x exp -6) in/in /C
0.000 080 in/in /C

Deflection Temperature under flexural load (F)
ASTM D648

264 psi ---
Dry as molded (about 0.2% moisture content)
158 to 212 F
66 psi ---

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DEPUY MITEK, INC., a)
Massachusetts corporation,)
Plaintiff,) Civil Action
vs.) 04-12457 PBS
ARTHREX, INC., a Delaware)
corporation,)
Defendant.)

- - - - -
The deposition of DEBI PRASAD

MUKHERJEE was taken on Tuesday, June 13,
2006, commencing at 9:08 a.m., at the
offices of Dickstein Shapiro Morin &
Oshinsky LLP, 2101 L Street, N.W.,
Washington, D.C., before Susanne Bergling,
Registered Merit Reporter and Notary Public.

<p style="text-align: right;">122</p> <p>1 Q. How about a Tara Shaneville (ph), I think 2 it is, did you ever speak with her? 3 A. No, thought that I can -- 4 Q. How about Don Grafton? 5 A. I knew Don Grafton before this case, but 6 during this case, I didn't spoke -- speak to him. 7 Q. Okay, all right. Why did you speak with 8 Mr. Benavitz? 9 A. I saw him at the Academy of Orthopedic 10 Surgeons meeting, and I believe I looked at the 11 FiberWire suture or -- FiberWire suture, that's 12 all. I don't remember exactly what I spoke, but I 13 am more interested in just to know what products 14 they have. 15 Q. Well, you referenced him in one of your 16 reports, that you had spoken with him, so -- 17 A. Yeah. 18 Q. -- what conversation did you -- had you had 19 with him regarding this case? 20 A. Tell me where I said that. 21 Q. It's in your responsive report at page 5. 22 A. This is 239? 23 MR. TAMBURRO: 240. 24 THE WITNESS: 240? 25 BY MR. BONELLA:</p>	<p style="text-align: right;">124</p> <p>1 yeah -- 2 Q. March 22nd? 3 A. -- in Chicago, yes. 4 Q. Of this year? 5 A. Uh-huh. 6 Q. And what -- do you recall what you 7 discussed with him? 8 A. Again, I -- you know, I remember, you know, 9 just -- I'm only interested in their products, 10 what they have, because we are interested in doing 11 orthopedic evaluation of their products. 12 Q. So, what do you remember about your 13 discussion with him? 14 A. That's all I remember, that -- 15 Q. Did anything you discussed with him form or 16 impact your opinions at all? 17 A. No. 18 Q. Okay. Did you ever speak with 19 Mr. Witherspoon? 20 A. Yes, I did. 21 Q. Okay. How long did -- how many 22 conversations did you have with Mr. Witherspoon? 23 A. I think couple of times. 24 Q. Couple of times, two to three? 25 A. About that.</p>
<p style="text-align: right;">123</p> <p>1 Q. Page 5. 2 A. Page 5. 3 Q. Section 3, Review and Use of Documents and 4 Other Materials, third line from the end of that 5 section. 6 A. If my memory serves me right, I think I 7 looked at the -- again, I'm not sure, the 8 FiberWire -- I mean, the Tiger (ph) suture, if I 9 remember correctly, that's where I saw it, and 10 that's all. I probably did -- I don't know 11 whether I did any lab test or anything like that, 12 I don't remember exactly. That was very small 13 conversation, less than five minutes. 14 Q. So, you spoke -- I'm getting confused. 15 Your conversations with Benavitz, you're talking 16 about the one you had with relevance to this case 17 as opposed to the discussion you had at the 18 conference? 19 A. Well, that's the discussion at the 20 conference. 21 Q. Is the one you're referencing? 22 A. That's what I'm talking about, yeah. 23 Q. Okay. And was that academy conference, is 24 that March 22nd? 25 A. Academy of Orthopedic Surgeons meeting,</p>	<p style="text-align: right;">125</p> <p>1 Q. Okay. And how long were those 2 conversations? 3 A. It could be half an hour, 45 minutes, or 4 maybe less. I don't remember. 5 Q. And what were those discussions about? 6 A. Well, he was helping me with the legal side 7 of this, and that's what was expressed in my 8 report. The legal part came from him. 9 Q. He was helping you understand the legal 10 framework? 11 A. I don't understand, but what he described 12 to me, yes, I did. 13 Q. So, he was helping you understand the legal 14 context for your report? 15 A. Some -- some things that, you know, that he 16 went over, um-hum, yes, I understood. 17 Q. Okay. And developing this report, your 18 three reports, did you speak with the lawyers from 19 Mr. Tamburo's firm? 20 A. Yes, I spoke to Mr. Saber and Mr. Tamburo 21 several times. 22 Q. How about Mr. Soffen, did you ever speak 23 with him? 24 A. In the beginning, yes. 25 Q. Okay. So, you have met Mr. Soffen?</p>

<p>134</p> <p>1 Pearsalls?</p> <p>2 A. No.</p> <p>3 Q. In Exhibit 23 -- the first report, Exhibit</p> <p>4 239, at the end, Exhibit 1, there's the documents</p> <p>5 reviewed and considered in connection with that</p> <p>6 report.</p> <p>7 A. Yeah.</p> <p>8 Q. Did you list all the documents reviewed and</p> <p>9 considered in connection with forming your</p> <p>10 opinions in Exhibit 239 in Exhibit 1 of Exhibit</p> <p>11 239?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. How about Exhibit 240, Exhibit 1,</p> <p>14 again, the documents reviewed and considered, did</p> <p>15 you list in Exhibit 1 to Exhibit 240 all the</p> <p>16 documents reviewed and considered in forming your</p> <p>17 opinions with respect to Exhibit 240?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. And Exhibit 356, your rebuttal</p> <p>20 expert report, for Exhibit 356, did you list all</p> <p>21 the documents reviewed and considered in forming</p> <p>22 your opinions expressed in Exhibit 34 -- in</p> <p>23 Exhibit 356 in Exhibit 1 to that report?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. Now, you have three reports, right?</p>	<p>136</p> <p>1 reviewed and considered those materials? Did you</p> <p>2 ask for all information bearing on an issue from</p> <p>3 the law firm or --</p> <p>4 A. They supplied and I asked and I supplied</p> <p>5 some information.</p> <p>6 Q. Okay.</p> <p>7 A. So, that's how it worked. Mostly they</p> <p>8 supplied.</p> <p>9 Q. Okay. Did you ask the law firm for all</p> <p>10 information bearing on an issue?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. And you took their word that they</p> <p>13 gave you everything that was relevant to that</p> <p>14 information?</p> <p>15 A. That's correct.</p> <p>16 Q. Okay. The testing that Dr. Gitis did, were</p> <p>17 you present for that testing?</p> <p>18 A. I was not present.</p> <p>19 Q. Okay. The testing that Dr. Burks did, were</p> <p>20 you present for that testing?</p> <p>21 A. No.</p> <p>22 Q. I'm going to refer to the claims of the</p> <p>23 '446 patent today, when we talk about them, the</p> <p>24 ones that I think you have opined on are claims 1,</p> <p>25 2, 8, 9 and 12. Is that right?</p>
<p>135</p> <p>1 A. Yeah.</p> <p>2 Q. So, they list all of the -- they list and</p> <p>3 describe all of the opinions that you have in this</p> <p>4 case?</p> <p>5 A. That's correct.</p> <p>6 Q. Okay. Do you have any opinions that you've</p> <p>7 formed subsequent to signing these reports with</p> <p>8 respect to this case?</p> <p>9 MR. TAMBURIO: Objection, vague.</p> <p>10 THE WITNESS: No.</p> <p>11 BY MR. BONELLA:</p> <p>12 Q. Okay. Have you looked at any additional</p> <p>13 materials since you signed the last report,</p> <p>14 Exhibit 356?</p> <p>15 MR. TAMBURIO: Objection, vague.</p> <p>16 THE WITNESS: Related to this case?</p> <p>17 BY MR. BONELLA:</p> <p>18 Q. Yes.</p> <p>19 A. Okay. No.</p> <p>20 Q. Are you or have you been asked to prepare</p> <p>21 another expert report in this case?</p> <p>22 A. No.</p> <p>23 Q. In forming your report or your opinions,</p> <p>24 you listed the materials that you reviewed and</p> <p>25 considered. How did it come about that you</p>	<p>137</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. So, when we talk about -- can we</p> <p>3 just, for shorthand, refer to the claims of the</p> <p>4 '446 patent, and when we refer to the claims of</p> <p>5 the '446 patent, we will be referring to claims 1,</p> <p>6 2, 8, 9 and 12. Is that okay?</p> <p>7 A. That's fine.</p> <p>8 Q. Because those are the only ones you have</p> <p>9 opinions on, right?</p> <p>10 A. Okay.</p> <p>11 MR. BONELLA: Let's take a short break.</p> <p>12 VIDEOGRAPHER: We are going off the record</p> <p>13 at 11:39.</p> <p>14 (A brief recess was taken.)</p> <p>15 VIDEOGRAPHER: We're back on the record at</p> <p>16 11:47.</p> <p>17 BY MR. BONELLA:</p> <p>18 Q. In forming the opinions in your responsive</p> <p>19 report, Exhibit 240, do you recall any other</p> <p>20 communications you received from anyone that you</p> <p>21 used in forming your report?</p> <p>22 A. Other than are listed here?</p> <p>23 Q. Right.</p> <p>24 A. No.</p> <p>25 Q. Did you see any drafts of Dr. Burks' report</p>

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Civil Action No. 04-12457 PBS

DEPUY MITEK, INC., a Massachusetts)
Corporation,)
)
Plaintiff,)
)
v.)
)
ARTHREX, INC., a Delaware Corporation)
)
Defendant.)

Videotaped Deposition of DEBI PRASAD MUKHERJEE

- VOLUME TWO -

Washington, DC

Wednesday, June 14, 2006

The videotaped deposition of DEBI PRASAD MUKHERJEE, Volume Two, was held on Wednesday, June 14, 2006, commencing at 9:12 a.m., at the offices of Dickstein Shapiro Morin & Oshinsky LLP, 2101 L Street, Northwest, Washington, DC, before Mary Ann Payonk, RDR, Certified Realtime Reporter, Registered Diplomate Reporter and Notary Public.

Page 474

1 A Again, as far as I know, you got to do the
2 statistical analysis of the whole data.
3 Q Did you --
4 A You cannot pick this 27 percent times it
5 goes up and down because if you do it -- more
6 experiments, that 27 percent could be the other -- the
7 other way.
8 Q It might go up? It might go up to
9 50 percent?
10 A Yeah, it could be. Could be. But that's
11 why you take the average and the standard deviation.
12 That's what I didn't do but that I should have done.
13 Q Okay. Can you explain why -- look at --
14 if you go down the left-hand side of the page you see
15 the entry of 22 September '05?
16 A 206874?
17 Q 2687 to 22 September '05?
18 A Yeah.
19 Q The value went from die of 16.61 to
20 measure of 15.05.
21 A Right.
22 Q Can you explain that?
23 A No. The same -- same my explanation as
24 before, I explained to you before.
25 Q Did anyone tell you about intermediate

Page 475

1 stage of data from Pearsalls?
2 A I don't remember.
3 Q Okay. Did you ask for the intermediate
4 stage data?
5 MR. TAMBURIO: Objection, assumes facts.
6 A I did not.
7 BY MR. BONELLA:
8 Q Okay. Do you know what the difference
9 between the intermediate stage and the measure stage
10 is?
11 A No, I do not.
12 Q Okay. Did you -- in relying on Exhibit 25
13 did you consider any error analysis of your data?
14 A No, I did not.
15 Q Okay. In the average at the end that you
16 saw of Exhibit 25 --
17 A Uh-huh.
18 Q -- 14.39 to 14.84 --
19 A Right.
20 Q -- is that a statistically significant
21 difference?
22 A I cannot guess, but I did not do the
23 statistical calculations. I cannot give you the
24 answer.
25 Q Okay. The next exhibit to your report is

Page 476

1 Exhibit 26.
2 A Yes.
3 Q It says properties of PET.
4 A Yes.
5 Q And the next -- the third page is nylon 66
6 properties?
7 A Page 3?
8 Q Right.
9 A Nylon 66.
10 Q Right, okay. Under the PET it says it's
11 unfilled, and under the nylon 66 it's molding
12 compound.
13 A That's correct.
14 Q Okay. These aren't fiber properties,
15 right?
16 MR. TAMBURIO: Objection, assumes facts and
17 it's vague.
18 A I'm not sure.
19 BY MR. BONELLA:
20 Q You're not sure?
21 A No.
22 Q In relying on -- in this case to determine
23 properties for PET and -- well, is there a difference
24 between molding compound properties and fiber
25 properties --

Page 477

1 MR. TAMBURIO: Objection, vague.
2 BY MR. BONELLA:
3 Q -- for nylon 66?
4 A The -- it can be.
5 Q Okay.
6 A But I relied on the suture properties,
7 because that's really the way -- the final product.
8 Q Okay.
9 A But fibers, it -- normally, they're
10 stronger than the molding.
11 Q Okay. Did you rely on -- well, how about
12 unfilled PET? Is that the same as fiber PET?
13 MR. TAMBURIO: Objection. Objection,
14 vague.
15 A Probably not. It's probably molding also.
16 BY MR. BONELLA:
17 Q Okay. I'd like to ask you about a couple
18 documents. I'd like to show you a few Mitek exhibits.
19 320. Can we put that back together?
20 A Yeah, okay.
21 Q Here, why don't you put that back
22 together?
23 A Okay. Yeah, no, this -- I was -- I was
24 worried about that. Okay, thank you.
25 Q Ever see this document before?

16 (Pages 474 to 477)

VERITEXT CORPORATE SERVICES (800) 567-8658

b6700ed5-0cd8-431b-9964-a0e9cbbaf4ea

Page 506

1 suture B with suture B were subtle -- well, let me
 2 back up. Did you -- have you been shown Dr. Burks'
 3 deposition transcript?
 4 A No.
 5 Q No? Would you like to see it?
 6 A No.
 7 Q Why not?
 8 A Because that's not relevant in my report
 9 here.
 10 Q It's not relevant to your opinions?
 11 A I mean right now, what I'm going right
 12 through.
 13 Q Is Dr. Burks' deposition transcript
 14 relevant to your opinions?
 15 A Based on the -- I was -- I was informed
 16 and, as I reported here, that's all I -- I can do
 17 right now.
 18 Q Okay. The question is a yes-or-no
 19 question. Is Dr. Burks' deposition transcript
 20 relevant to your opinions?
 21 MR. TAMBURIO: Objection, calls for a legal
 22 conclusion.
 23 A No. I rely on the expert report.
 24 BY MR. BONELLA:
 25 Q Okay. Would you -- if he said in his

Page 507

1 deposition that the differences between suture A and
 2 suture B were subtle, is that information you'd like
 3 to consider in forming your opinions?
 4 A No.
 5 MR. TAMBURIO: Objection.
 6 BY MR. BONELLA:
 7 Q Why not?
 8 MR. TAMBURIO: Mischaracterizes the
 9 testimony, vague question, and calls for legal
 10 conclusion.
 11 BY MR. BONELLA:
 12 Q Why not?
 13 A Again, I go by his expert report that he
 14 saw the difference. That's the only thing that I can
 15 go by so I cannot answer your question, no.
 16 Q If he -- if he described the differences
 17 between suture A and suture B as subtle and it was
 18 even with gloves off, is that something you'd like to
 19 know?
 20 MR. TAMBURIO: Objection, vague.
 21 A No.
 22 MR. TAMBURIO: Mis -- give me a chance to
 23 object.
 24 THE WITNESS: Okay. Sorry.
 25 MR. TAMBURIO: Okay? Objection, vague, and

Page 508

1 mischaracterizes the testimony, incomplete
 2 hypothetical.
 3 BY MR. BONELLA:
 4 Q So you don't want to know what his
 5 testimony was about the tests?
 6 MR. TAMBURIO: Objection, mischaracterized
 7 the witnesses testimony.
 8 A Correct. I don't want to know.
 9 BY MR. BONELLA:
 10 Q And you don't want to know what Dr. Burks
 11 testified about how he actually did the test in his
 12 deposition?
 13 A No.
 14 Q And do you know want to know how Dr. Burks
 15 described the results that he obtained from the test
 16 in the deposition?
 17 A No.
 18 Q "No," meaning you don't want to know?
 19 A That's correct.
 20 MR. BONELLA: Let's take a quick break.
 21 THE VIDEOGRAPHER: Now going off the video
 22 record at 11:04 a.m.
 23 (A recess was taken from 11:04 a.m.
 24 through 11:18 a.m.)
 25 THE VIDEOGRAPHER: We're now back on the

Page 509

1 video record. The time is 11:18 a.m. and this is the
 2 start of tape two, volume two in the continuing
 3 deposition of Debi Prasad Mukherjee.
 4 (Exhibit No. 364 was marked.)
 5 (Exhibit No. 365 was marked.)
 6 BY MR. BONELLA:
 7 Q Dr. Mukherjee, we've marked what counsel
 8 has produced for inspection here at the deposition as
 9 DePuy Mitek Exhibit 364 is a suture that -- in a bag
 10 that's labeled as uncoated, and Exhibit 365 is a
 11 suture in a bag labeled as coated. Do you see those?
 12 A Yes.
 13 Q Are those the sutures that you performed a
 14 drape test on?
 15 A Yes.
 16 Q Now, the drape test that you performed, is
 17 there any literature that describes drape tests?
 18 A No, this is just a very subjective test.
 19 And I just wanted to get a feel for that. That's why
 20 I did. It's not scientific.
 21 Q Is the drape test that you performed, is
 22 that subject to peer review?
 23 A No, it isn't.
 24 Q No? Okay. Can you show me -- well, let
 25 me back up. When you were given the samples to

24 (Pages 506 to 509)

Page 510

1 perform the drape test, do you know where they came
2 from?
3 MR. TAMBURIO: Objection, vague.
4 A For sure, I didn't know, but I had to
5 depend on the counsel where it came from.
6 BY MR. BONELLA:
7 Q Well, what did you think? Where do you
8 think they came from?
9 A I don't know.
10 Q Okay. Did Dr. Gitis send them to you?
11 A No.
12 Q Who gave them to you? Counsel?
13 A Yes.
14 Q Where did you perform the drape test?
15 A It was actually in a hotel in Chicago.
16 Q Okay.
17 A I was in a meeting.
18 Q Who was present?
19 A Sal was there, Sal, Mr. Tamburo.
20 Q Anybody else present?
21 A No.
22 Q How -- when you were given the samples,
23 were they given to you on spools, or how were they
24 given to you?
25 A Just like this.

Page 511

1 Q In the bags?
2 A Not -- I didn't know which one is which.
3 Q You didn't?
4 A No.
5 Q Okay. Doesn't say that in your report,
6 that you didn't know which one was which.
7 A Before the test, I did not know which one
8 is which.
9 Q You didn't?
10 A No.
11 Q Okay.
12 A If I -- after the test --
13 Q Okay.
14 A -- and I was just curious to know what we
15 found.
16 Q Okay. Now, the samples that you were
17 given, do you know, are these the exact samples that
18 you were given? Were you given any more samples, or
19 just these two?
20 A That's it.
21 Q That's it?
22 Do you know how these samples were handled
23 before they were given to you?
24 MR. TAMBURIO: Objection, vague.
25 A I do not know.

Page 512

1 BY MR. BONELLA:
2 Q Can handling sutures affect its
3 handleability properties?
4 MR. TAMBURIO: Objection, vague.
5 A It can, but nonabsorbables normally don't.
6 Absorbables, yes, because the change in moisture and
7 handling.
8 BY MR. BONELLA:
9 Q Even for nonabsorbables, if you handle
10 them a lot. Even for nonabsorbables, if you handle
11 them and bend them won't that change the -- can't that
12 change the properties?
13 MR. TAMBURIO: Objection, assumes facts and
14 is vague.
15 A It's possible, but very minimum.
16 BY MR. BONELLA:
17 Q Did you ever hear of functional testing?
18 A Of?
19 Q Of sutures.
20 A Yes.
21 Q And what -- and what do you understand
22 that to be?
23 A There is different kind of functional
24 test. It depends on the handling, the surgical use,
25 knot tying, all the other things. There are many

Page 513

1 tests.
2 Q Okay. Have you ever done -- have you ever
3 seen any test results from Dr. Steckel to the
4 difference between sutures that were handled, sutures
5 that were not handled?
6 A I probably have, but I don't remember.
7 Q Okay. Did -- have you ever -- did you
8 consider -- in your analysis, did you ask what the
9 history of the Exhibits 364 and 365 sutures were, how
10 they were handled before you got them?
11 MR. TAMBURIO: Objection, vague.
12 A No, I didn't. This is just a curiosity
13 for my sake. That's what I did, so I was not -- it
14 was not a scientific, just done -- I just wanted to
15 know, because I had suture experience, just to see
16 what it looked like.
17 BY MR. BONELLA:
18 Q Could you --
19 A Go ahead.
20 Q Could you tell by feeling the sutures
21 which was coated and which was uncoated?
22 MR. TAMBURIO: Objection.
23 BY MR. BONELLA:
24 Q Or is it by the drape test that you
25 performed that you thought one was coated and one was

25 (Pages 510 to 513)

Page 514

1 uncoated?

2 MR. TAMBURIO: Objection, vague and
3 compound.

4 A I don't remember whether I felt it. I may
5 or may not.

6 BY MR. BONELLA:

7 Q Okay. Do you have experience enough that
8 you can tell differences between sutures based on
9 feel, whether they're coated or uncoated?

10 A I used to, but now it's a little rusty
11 now.

12 Q Rusty now?

13 A It was many years ago.

14 Q Okay. Can you show me with the exhibits
15 how you performed the drape test?

16 A I didn't understand.

17 Q Can you show me the drape test that you
18 performed with Exhibits 364 and 365?

19 A Oh, oh, yes, yes. You want me to show for
20 each one of those samples?

21 Q Yes, but let me back up before you do
22 that. Did you do at a drape test on any other samples
23 besides Exhibits 364 and 365?

24 MR. TAMBURIO: Objection, vague.

25 A Not in relation to this suture but we

Page 515

1 always did when I was developing sutures.

2 BY MR. BONELLA:

3 Q All right.

4 A Not in this context, no.

5 Q Let me ask a better question. Did you do
6 a drape test of any other FiberWire or TigerWire
7 samples in forming your opinions?

8 A No.

9 Q No?

10 A Only these samples.

11 Q You didn't do a drape test of TigerWire
12 samples?

13 A The only thing I did not remember at the
14 academy was that I saw a TigerWire suture with Mr.
15 what's his name? Bernard?

16 Q Benovitz.

17 A Benovitz. I don't remember that.

18 Q You saw a TigerWire suture, you said?

19 A Yeah, it was shown there in the -- the --
20 the booth.

21 Q But you didn't do a drape test --

22 A No.

23 Q -- of the TigerWire?

24 Did Mr. Tamburo give you TigerWire samples
25 to do a drape test?

Page 516

1 A No.

2 Q Did you do a drape test of TigerWire while
3 Mr. Tamburo was present?

4 A No, no. TigerWire, I wouldn't have done
5 anything.

6 Q Okay. Can you show me then the drape test
7 that you did with Exhibits 364 and 365?

8 A I'll do the best I can.

9 Q Okay.

10 A Remember, this is not a scientific test.

11 Q Okay.

12 A It's a -- very subjective. It's my
13 curiosity.

14 Q Okay.

15 A This is what I did.

16 Q Now you're using Exhibit 364?

17 A I don't know.

18 Q That's the suture that was out of the
19 Exhibit 364 bag.

20 A 364, yeah.

21 Q And you put it over your finger?

22 A Yeah.

23 Q Okay.

24 A And I just looked at two things, you know,
25 how far -- how much this conform. I let it hang like

Page 517

1 that and see how much is conformed to my finger.

2 Q Okay.

3 A And, you know, I also look at this part,
4 whether it's really conforming to this side of the
5 finger.

6 Q Okay.

7 A Again, this is very subjective,
8 scientific -- not a scientific --

9 Q Okay.

10 A -- test.

11 Q Now, if you pull the suture down on this
12 side --

13 A Pull this one?

14 Q Yep, just pull this one down a little bit.
15 Doesn't it change how much --

16 A No.

17 Q -- it conforms?

18 A I didn't -- I didn't want to handle too
19 much, but --

20 Q Does it --

21 A -- I didn't see any -- doesn't conform.
22 It's still -- the distance is still --

23 Q Sure.

24 A -- considerable.

25 Q And --

26 (Pages 514 to 517)

Page 518

1 A And this loop is still, you know, is
 2 bigger open loop.
 3 Q Now, the way you're holding it now the
 4 suture lengths are about equal --
 5 A Correct.
 6 Q -- from either end. Doesn't the weight of
 7 the suture on the other side -- on either side affect
 8 how much it conforms on either side?
 9 A I don't think so.
 10 Q It doesn't?
 11 A No.
 12 Q What's your basis for saying that?
 13 A Because if you lay the suture pliability,
 14 and that's Norm Gitis' results and all those things,
 15 so the weight is really very minimum. So it's
 16 really -- the weight of suture, the length difference
 17 and the weight difference is very minimal. So I -- my
 18 conclusion was it should not make a difference.
 19 Q Did you factor in your analysis how far
 20 down the suture hangs from either side, whether it had
 21 to be equal or not?
 22 A I -- I -- I tried to do it equal.
 23 Q Okay.
 24 A And again, it's an unscientific, it's a --
 25 it's just a feel of the suture and my point of view.

Page 519

1 Q Uh-huh.
 2 A Get a feel what the suture looked like.
 3 Q Okay. Now, can you put the coated on and
 4 show how the coated suture -- trying to make sure we
 5 keep them separate here so we know which one is which.
 6 Just hold that one over your finger, or --
 7 A Here, I'll put it in the envelope.
 8 Q No, keep that on your finger.
 9 A This one here.
 10 Q I'll pull this one.
 11 A I can't do both, both hands.
 12 Q Here, I'll pull this one out for you.
 13 MR. TAMBURO: Keep them separate.
 14 BY MR. BONELLA:
 15 Q Put them both on your finger and see how
 16 compare. So if we put the -- Exhibit 364 closer to
 17 your hand --
 18 A I'll put this one here?
 19 Q Right, Exhibit 364 on your hand.
 20 A Okay.
 21 Q Okay. And now I'm going to put 365
 22 towards the edge of your hand.
 23 A Okay.
 24 Q Now, describe to me how they're different.
 25 A And see how this one conforms in my eye

Page 520

1 close to the -- this finger, and -- and that one a
 2 little closer to this surface of the finger.
 3 Q Well, this looks close to your surface of
 4 the finger.
 5 A No. You see the loop? I'm looking at the
 6 loop.
 7 Q What loop?
 8 A This loop that made -- the suture max with
 9 respect to this. How --
 10 Q At the top?
 11 A How -- yeah.
 12 Q This loop right here?
 13 A This here and then this side.
 14 Q Okay.
 15 A Both side. And you can see how this loop
 16 is open.
 17 Q Well, this one's open further than this
 18 one on this side.
 19 A Well --
 20 MR. TAMBURO: Objection. Is that a
 21 question?
 22 BY MR. BONELLA:
 23 Q Right?
 24 MR. TAMBURO: Or are you testifying?
 25 BY MR. BONELLA:

Page 521

1 Q So the one on -- the one closer to the end
 2 is Exhibit 365 is open closer -- is open further than
 3 Exhibit 364, right?
 4 A It's very simple way. It is my opinion
 5 this is conforming to this finger surface more than
 6 this one. Looking at these --
 7 Q Okay.
 8 A -- and this --
 9 Q How about this side? Is your opinion that
 10 that one's conforming more to the surface?
 11 A Well, I have to leave my, you know --
 12 again, the --
 13 Q You changed the position of your hand.
 14 A No, but I -- I didn't --
 15 MR. TAMBURO: Objection, argumentative.
 16 BY MR. BONELLA:
 17 Q Well, you just did. You just changed the
 18 position of your hand and that changed how it
 19 conformed, right?
 20 A Well, no, I don't think so.
 21 Q You did. You rotated your hand.
 22 A Again, this is a very --
 23 MR. TAMBURO: Objection.
 24 A -- subjective --
 25 MR. TAMBURO: It's not a question.

27 (Pages 518 to 521)

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Page 522

1 A -- nonscientific --
 2 BY MR. BONELLA:
 3 Q Okay.
 4 A -- test.
 5 Q Could you rotate your hand back to the
 6 position it was in?
 7 A I put -- no, I -- normally I might have
 8 done it, but I don't know. You are saying that, but I
 9 don't remember that, I just -- I just took this finger
 10 out because it was touching.
 11 Q But you rotated your hand and changed the
 12 position. Now, on the -- the -- on the left-hand side
 13 are you saying one conforms more?
 14 A Yeah, this conforms more.
 15 MR. TAMBURIO: Whose left-hand side?
 16 MR. BONELLA: His left-hand side.
 17 BY MR. BONELLA:
 18 Q It does?
 19 A Yeah.
 20 Q Why do you say that?
 21 A That's what I'm looking at, these
 22 separation between this surface and the suture.
 23 Q Doesn't this one come closer to your hand
 24 and this one comes further out?
 25 A No.

Page 523

1 Q You don't see that?
 2 A No.
 3 Q Okay. And you agree this isn't a
 4 scientific test?
 5 A I -- I -- I'm repeating. This is not a
 6 scientific. It's my way to look at the sutures --
 7 Q Okay.
 8 A -- what I feel like, that's all.
 9 Q Now, if you adjust the suture in your hand
 10 could that change how it conforms?
 11 MR. TAMBURIO: Objection, vague.
 12 A I will not guess on anything. This is not
 13 a scientific test, this is just to get a feel. I have
 14 to rely on Dr. Burks' report and Norman Gitis' report,
 15 more scientific basis to show the difference. This is
 16 no way to make a conclusion. This is a nonscientific
 17 test.
 18 BY MR. BONELLA:
 19 Q Okay. If you change the position of the
 20 suture in your hand can that change how it conforms --
 21 A I -- I cannot --
 22 Q -- to your hand?
 23 MR. TAMBURIO: Objection, vague.
 24 A I cannot comment on that because those are
 25 not things I -- I considered.

Page 524

1 BY MR. BONELLA:
 2 Q You didn't?
 3 A No.
 4 Q Do you know -- have you ever seen a --
 5 let's put these back.
 6 A Okay.
 7 Q This is 365.
 8 MR. TAMBURIO: That was the coated, yeah.
 9 THE WITNESS: Yeah.
 10 MR. BONELLA: And this is 364.
 11 THE WITNESS: Right.
 12 BY MR. BONELLA:
 13 Q Did you consider in your analysis in this
 14 drape test -- well, let me back up. Have you ever
 15 seen a suture round around -- wound around a spool?
 16 A Yes.
 17 Q Okay. And have you ever seen a suture
 18 come off a spool? It kind of takes the shape of the
 19 spool. It's kind of --
 20 A Yes, I've seen that.
 21 Q Okay. Did you consider in your analysis
 22 how -- whether -- in your drape test analysis, excuse
 23 me, how the sutures were taken -- how the sample were
 24 on the spool and whether that mattered?
 25 A No, I didn't consider. I didn't see any

Page 525

1 curling like that.
 2 Q Okay.
 3 A Normally you see if it's very stiff
 4 suture.
 5 Q Okay. But you didn't see the spools that
 6 they were taken from? You didn't see them taken off
 7 the spools?
 8 A No, no, I did not.
 9 Q Okay. Did you see any spools of
 10 FiberWire?
 11 MR. TAMBURIO: Objection, vague.
 12 A No, I have not.
 13 BY MR. BONELLA:
 14 Q Okay. In Dr. Gitis' testing, is it your
 15 understanding that he tested a -- a number 2 FiberWire
 16 sutures?
 17 A That's correct.
 18 Q Okay. He -- he didn't do any testing of
 19 TigerWire, right?
 20 A What's in the report, that's what he
 21 tested.
 22 Q Okay. Did you ask Dr. Gitis to do any
 23 testing of the TigerWire?
 24 A No, I did not.
 25 Q Why not?

28 (Pages 522 to 525)

Page 526

1 A Because that's not my decision to do what
2 test -- what samples to be tested so I didn't go to
3 TigerWire.
4 Q Do you have an opinion about how -- do you
5 know that TigerWire has one nylon --
6 A Yes.
7 Q -- strand in it?
8 And do you have an opinion about how that
9 nylon strand affects TigerWire's pliability?
10 A It's in my report. The nylon will
11 affect --
12 Q Okay.
13 A -- the pliability.
14 Q Did you do any -- why didn't Dr. Gitis do
15 some TigerWire pliability tests to determine the
16 effect of nylon?
17 A I cannot answer. I do not know.
18 Q Is it required to -- for -- to have a
19 pliability test that Dr. Gitis did in order to
20 determine the effect of nylons on the pliability of
21 FiberWire?
22 MR. TAMBURIO: Objection, vague.
23 A Probably.
24 BY MR. BONELLA:
25 Q Okay. Where were you given the -- the

Page 527

1 '446 patent, the -- the Hunter patent that's Exhibit 3
2 to your report?
3 A Exhibit 3, yes.
4 Q Where were you given that, the Hunter
5 patent?
6 A Please clarify.
7 Q When's the first time you saw the Hunter
8 patent?
9 A I don't remember exactly, but very early
10 stage when -- when I was consult -- I was actually
11 contacted for expert witness.
12 Q Uh-huh.
13 A The first time I came here, I saw the --
14 the -- the '446 patent.
15 Q Is it the first thing you saw in
16 connection with this case?
17 A I cannot say that. I saw several things,
18 but --
19 Q Okay.
20 A The patent is one of them.
21 Q Is the -- is reading the '446 patent one
22 of the first things you did?
23 A I don't know the first thing or second
24 thing or tenth thing, but I --
25 Q Okay.

Page 528

1 A I did look at '446 --
2 Q Did --
3 A -- at that time.
4 Q Did you read the '446 patent early on to
5 see whether you could form any opinions in the case?
6 MR. TAMBURIO: Objection, vague.
7 A Not before the discussions here before I
8 came here.
9 BY MR. BONELLA:
10 Q Before you came to meet with the lawyers?
11 A Yeah.
12 Q So you didn't read the '446 patent before
13 you came to meet with the lawyers. You met with the
14 lawyers, and then when did you read the '446 patent?
15 MR. TAMBURIO: Objection, vague, and
16 mischaracterizes the testimony, compound.
17 BY MR. BONELLA:
18 Q I'm not trying to mischaracterize, I'm
19 just trying to understand. I'm not trying to
20 mischaracterize.
21 A You know, it -- I don't understand myself
22 that -- if I remember correctly. But please pardon
23 me. I'm a more than 67 years old man so I don't
24 remember a lot of things.
25 Q Well, you look great for 67.

Page 529

1 A But that's why I -- I just don't remember.
2 I mean, it's -- I read it.
3 Q Okay. If you don't remember, I'm just
4 trying to figure out what happened in the sequence of
5 events.
6 A Well, it's very difficult for me to
7 reconstruct all of this.
8 Q Okay.
9 A I -- I -- I'm trying to help you roughly
10 is what it is.
11 Q Right. And so you were contacted in
12 connection with this case, and you came and met with
13 the lawyers here?
14 A Yes.
15 Q Okay. Before you came and met with the
16 lawyers did you read anything in connection with the
17 case?
18 A Not connection with the case, but I knew
19 about Arthrex suture. Like I told you before, I
20 valued it not at their expense or the -- just because
21 I was interested because it was a strong suture. So I
22 knew something about the suture.
23 Q Okay.
24 A That FiberWire suture.
25 Q Okay. But in connection with the case did

29 (Pages 526 to 529)

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EXHIBIT 5

AO 88 (11/91) Subpoena in a Civil Case

United States District Court**FOR THE DISTRICT OF LOUISIANA**

DePuy Mitek, Inc.,
a Massachusetts Corporation

Plaintiff,

V.

Arthrex, Inc.,
a Delaware Corporation and

Pearsalls Ltd.,
A Private Limited Company
of the United Kingdom,

Defendants.

SUBPOENA IN A CIVIL CASE in the
United States District Court for the
District of Massachusetts

Case Number: 04cv12457 PBS

TO: Debi Prasad Mukherjee
1501 Kings Highway, P.O. Box 33932
Shreveport, Louisiana 71130

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. The deposition will be recorded by stenographic means and recorded by video and audio tape, and by instant visual display of the stenographic record.

PLACE OF DEPOSITION

DATE AND TIME

June 13, 2006 at 8:00 a.m.

Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street NW
Washington, D.C. 20037-1526 USA

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the documents and things set forth in Schedule A attached hereto at the place, date, and time specified below:

PLACE

DATE AND TIME

June 13, 2006 at 8:00 a.m.

Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street NW
Washington, D.C. 20037-1526 USA

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (ATTORNEY FOR PLAINTIFF)

DATE

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Lynn Malinoski, Woodcock Washburn LLP, One Liberty Place, 46th Floor, Philadelphia, Pennsylvania 19103, 215-568-3100

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

AO 88 (11/91) Subpoena in a Civil Case

PROOF OF SERVICE

SERVED	DATE	PLACE
SERVED ON (PRINT NAME)	MANNER OF SERVICE	
SERVED BY (PRINT NAME)	TITLE	

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

Signature of Server

Address of Server

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

© PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for depositions, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place

more than 100 miles from the place where that person resides, is employed

or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(b)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Schedule A

Pursuant to Rule 45 of the Federal Rules of Civil Procedure and the Local Rules of the District of Massachusetts, Plaintiff DePuy Mitek, by and through its counsel, will take the deposition upon oral examination of Debi Prasad Mukherjee beginning on June 13, 2006 at 8:00 a.m. at the offices of Dickstein Shapiro Morin & Oshinsky LLP, 2101 L Street NW, Washington, D.C. 20037 USA. The deposition will be conducted before an officer authorized by law to administer oaths and will be recorded by stenographic and video means. The deposition will proceed from day to day, weekends and federal holidays excluded, until completed.

Instructions and Definitions

1. DePuy Mitek has sued Arthrex in the United States District Court for the District of Massachusetts for Arthrex's infringement of U.S. Patent No. 5,314,446. A copy of DePuy Mitek's Amended Complaint is attached as Exhibit 1.

2. "Arthrex" means Arthrex, Inc. and includes each of its predecessors, successors, subsidiaries, divisions, and departments.

3. "Concerning" means referring to, relating to, commenting upon, evidencing or embodying.

4. "Communication(s)" means any transmission of information by one or more persons or between two or more persons by any means including, but not limited to, emails, telephone conversations, letters, telegrams, teletypes, telexes, telecopies, computer linkups, written memoranda, and face-to-face conversations.

5. "You" means Debi Prasad Mukherjee.

Schedule A: Documents To Be Produced

Request No. 1

All communications between any of Arthrex, you, Dr. Gitis, Dr. Burks, and/or Dickstein, Shapiro, Morin & Oshinsky LLP concerning the lawsuit commenced by the Complaint attached as Exhibit 1.

Request No. 2

All documents and things concerning this lawsuit, including, but not limited to, documents concerning "Expert Report of Dr. Debi Prasad Mukherjee Concerning Invalidity of U.S. Patent No. 5,314,446," "Responsive Expert Report of Dr. Debi Prasad Mukherjee Concerning Non-infringement of U.S. Patent No. 5,314,446 and Other Matters," and "Rebuttal Expert Report of Dr. Debi Prasad Mukherjee."

Things To Be Produced

Request No. 1

All tested and untested samples referred to in "Expert Report of Dr. Debi Prasad Mukherjee Concerning Invalidity of U.S. Patent No. 5,314,446" dated March 3, 2006, and in "Responsive Expert Report of Dr. Debi Prasad Mukherjee Concerning Non-infringement of U.S. Patent No. 5,314,446 and Other Matters" dated March 24, 2006, or that Dr. Mukherjee evaluated or had in his possession, including any spools or other information concerning the samples.

Request No. 2

All tested and untested FiberWire suture samples referred to in Dr. Gitis' "Comparative Suture Testing" report dated March 23, 2006.

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DePuy Mitek, Inc.)	
a Massachusetts Corporation)	
)	
Plaintiff,)	
)	
v.	)	Civil No. 04-12457 PBS
)	
Arthrex, Inc.)	
a Delaware Corporation and)	
)	
Pearsalls Ltd.,)	
a Private Limited Company)	
of the United Kingdom,)	
)	
Defendants.)	

Rebuttal Expert Report of Dr. David Brookstein

I. Background Information

1. I previously submitted an expert report in this case on March 3, 2006. I have been asked to opine on certain opinions expressed by Dr. Mukherjee in his report entitled the "Responsive Expert Report of Dr. Debi Prasad Mukherjee Concerning Non-Infringement of U.S. Patent No. 5,314,446 and Other Matters."

2. I have reviewed the "Responsive Expert Report of Dr. Debi Prasad Mukherjee Concerning Non-Infringement of U.S. Patent No. 5,314,446 and Other Matters," the documents referenced in my prior report and those listed in Ex. H attached hereto.

II. Summary of Opinions

3. I disagree with Dr. Mukherjee's opinion that there is no infringement under the doctrine of equivalents, if "PE," as used in the claims of the 446 Patent, is construed not to include UHMWPE.

obtained in CETR's "pliability" test. But they are not. During the pliability tests, CETR found that the coated suture had a lower modulus, as shown by its smaller slope (Mukherjee Res. Report at Ex. 20 at 3-4). In contrast, the other two CETR tests report a higher modulus for the coated suture, but it is not clear by how much from the graph and data (Mukherjee Res. Report at Ex. 20 at 5-8). The point being that the tests results are inconsistent. They appear to contradict the conclusions drawn by Dr. Mukherjee from the CETR "pliability" tests. Based on the limited information that I have about the tests, they are either inconclusive or show that coating has no material affect on tensile strength because the variations are due to the testing, not the material.

52. I also disagree with the conclusions that Dr. Mukherjee draws from the "pliability" tests because they appear to be contradicted by Pearsalls' testing. Ex. AA summarizes the results of Pearsalls' tension tests on batches of FiberWire at the "dye," "intermediate," and "measure" stages. Pearsalls found that FiberWire's tensile strength basically stayed the same between the uncoated FiberWire and FiberWire that underwent the coating processes. Although there are some variations in the reported measurements (*i.e.*, the tensile strength appears to go up, down, and stay the same), it is my opinion that these are really just an artifact of the testing (*i.e.*, operator variations, knot tying, or the expected variations inherent to textile testing) and not true variations (see paragraphs 40-41). I note that Dr. Mukherjee ignores these data in his analysis.

(4) Dr. Mukherjee's "Drape" Test Is Flawed & Inconclusive

53. I have considered Dr. Mukherjee's "drape test." This "test" is overly simplistic and flawed. Dr. Mukherjee states that he performed his drape test by "draping the suture over [his] extended index finger and observing the degree to which the suture conforms to the shape of [his] finger" (Mukherjee Res. Report at 27). First, I do not understand what he means by "conforms to the shape of my finger." Therefore, I cannot fully respond to his statement

because, among other reasons, I cannot tell what he measured. Second, it appears that Dr. Mukherjee is attempting to approximate FiberWire's pliability by determining FiberWire's ability to bend by using his finger as a test rig. But this method is flawed because he did not provide a true cantilever end support. Consequently, there is no defined position as to where FiberWire begins its bending, and no definitive way to determine the degree of bending. Third, diameter affects pliability, and Dr. Mukherjee does not provide any diameter measurements for the samples that he compared. Therefore, based on what I can determine from his report, it is not possible to scientifically compare the pliability of the uncoated and coated FiberWire using this method.

54. I note that Dr. Mukherjee relies on documents that refer to Ethicon and Mitek products in his analysis (Mukherjee Res. Report at 23-24, Mukherjee Res. Report Exs. 14, 15, 17, & 18). I disagree that these documents are relevant to the analysis because they discuss products and coatings that are different than FiberWire. It is my opinion, that the effect of FiberWire's coating on FiberWire cannot be determined with reference to other products.

B. If Dr. Mukherjee Is Correct Regarding The Meaning Of The Novel And Basic Characteristics, TigerWire's Nylon Does Not Materially Affect Them

55. Dr. Mukherjee has opined that TigerWire does not infringe for the same reasons that he expressed regarding FiberWire (Mukherjee Res. Report at 30). I disagree for the reasons stated above with respect to FiberWire.

56. I understand that the differences between TigerWire and FiberWire are that TigerWire is not dyed blue and replaces one PET yarn strand with one black nylon yarn strand. Dr. Mukherjee opines that TigerWire's nylon materially affects pliability (Mukherjee Res. Report at 30-31). I disagree. The purpose of the nylon strand is for visual identification (Ex. V at 74:21-23). It is my opinion that replacing one PET yarn with one nylon yarn does not materially affect

the novel and basic characteristics of the claimed suture because the nylon marker does not prevent or materially affect FiberWire's PET and UHMWPE from being dissimilar, from being braided, or from being braided to have improved handleability and pliability without significantly sacrificing physical properties. I note that Dr. Mukherjee does not opine otherwise. Rather, he seems to opine that the nylon marker affects pliability. He does not address the issue of whether FiberWire's braid of dissimilar yarns with improved handleability and pliability performance without significantly sacrificing physical properties is affected.

57. Dr. Mukherjee states that TigerWire's nylon yarn "make[s] TigerWire stiffer" than FiberWire, and "materially" affects "pliability" (Mukherjee Res. Report at 31). He also states that "nylon 6,6 fibers of the type used in TigerWire are generally more stiff (*i.e.* less pliable) than fibers made of PET, as used in FiberWire and TigerWire" (Mukherjee Res. Report at 30). I again disagree. First, I disagree that generally TigerWire's nylon 6,6 fibers are necessarily stiffer than PET fibers. Dr. Mukherjee cites to his Ex. 26 for the principle that nylon is stiffer than PET. But Ex. 26 shows the comparative characteristics of "unfilled" PET and "molding compound" nylon. These are not the characteristics of fibers made from these polymers. Thus, it is my opinion that it is improper, absent further information, to rely on this molding compound data for fiber properties. Even if it were proper to rely on this data, Ex. 26 shows that PET has a flexural modulus of 350,000 psi to 450,000 psi and that nylon 6,6 has a flexural modulus of 410,000 psi to 470,000 psi. There is a significant overlap in these ranges. Based on this data, it is possible that nylon 6,6 fibers and PET fibers used in FiberWire and TigerWire have substantially the same flexibility. In that instance, the substitution of one nylon fiber for one PET fiber would have no substantial effect on the pliability of the braid. Second, even if the nylon and PET yarns have different flexibility, but the flexibility were still in the range cited in

Ex. 26, it is my opinion that replacing one nylon yarn with one PET yarn would not materially affect the suture's pliability because the two types of material are close enough in flexural modulus as to be essentially indistinguishable in the FiberWire braid. In fact, the one nylon yarn only makes up about 12% of the suture by weight (Ex. EE at ARM 14744).

58. Dr. Mukherjee's opinion that nylon 66 is generally more stiff than polyester is contradicted by *Marks' Standard Handbook for Mechanical Engineers* (Ex. J at Table 2 at p. 6-155). The elastic modulus of nylon 66 fiber ranges from 25 to 50 gpd and the elastic modulus for polyester fiber, which I read to include polyester, ranges from 50-80 gpd. Thus, it is indicated that nylon 66 fiber is *less stiff* than polyester.

59. My opinion that TigerWire's nylon does not materially affect TigerWire's pliability is supported by Arthrex's testimony. My. Dreyfuss from Arthrex testified that TigerWire and FiberWire show "very similar" knot strength, tensile strength, [and] handleability (Ex. V at 76:1-5). Also, Mr. Dreyfuss testified that that the nylon strand had only "minute" effects on the feel of the suture as compared to FiberWire (Ex. V at 75:13).

60. I understand that Dr. Mukherjee relies on a "drape" test comparing FiberWire and TigerWire. My comments and opinions about Dr. Mukherjee's "drape" test above apply here as well. Additionally, I do not understand what Dr. Mukherjee means when he says "to a much greater degree" and the "course [sic] feel would suggest that the addition of the nylon would adversely affect knot tie-down" (Mukherjee Res. Report at 31). Therefore, I cannot really respond to his opinion. Nevertheless, I understand that Dr. Hermes has considered both no. 2 TigerWire and FiberWire. I also understand that he could not determine any significant difference in the stiffness of TigerWire and FiberWire. Again, Dr. Mukherjee provides no diameter measurements for the samples, and diameter can affect pliability.

68. I reserve the right to comment further on Dr. Mukherjee's analyses and report when more information about the analyses becomes available. I may use trial demonstratives to explain my opinions.

Dated: April 13, 2006

A handwritten signature in black ink, consisting of a stylized 'D' followed by a series of loops and a long horizontal stroke extending to the right.

David Brookstein, Sc.D.
Fellow-American Society of Mechanical Engineers

BROOKSTEIN REBUTTAL REPORT EXHIBIT J

Marks' **Standard Handbook for Mechanical Engineers**

Revised by a staff of specialists

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Stevens Professor Emeritus of Mechanical Engineering,
Columbia University in the City of New York

EUGENE A. AVALLONE *Associate Editor*

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Consultant, Information Systems Department,
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*The editors and the publishers will be grateful to readers who notify them
of any inaccuracy or important omission in this book*

Table 1. Fiber Properties*

Kind	Source	Length of fiber, in.	Width or diam of cells, microns	Specific gravity	Moisture regain,† percent	Chemical description	Principal uses
Cotton.....	Plant seed hair	5/8-2	8-27	1.52	8.5	Cellulose	Industrial, household, apparel
Jute†.....	Plant bast	50-80	15-20	1.48	13.7	Lignocellulose	Bagging, twine, carpet backing
Wool.....	Animal	2-16	10-50	1.32	17	Protein	Apparel, household, industrial
Viscose.....	Manufactured	Any	8-43	1.52	11	Regenerated cellulose	Apparel, industrial, household
Cellulose acetate	Manufactured	Any	12-46	1.33	6	Cellulose ester	Apparel, industrial, household
Nylon.....	Manufactured	Any	8	1.14	4.2	Polyamide	Apparel, industrial, household
Casein.....	Manufactured	Any	11-28	1.3	4.1	Protein	Apparel
Flax†.....	Plant bast	12-36	15-17	1.5	12	Cellulose	Household, apparel, industrial
Hemp†.....	Plant bast	.....	18-23	1.48	12	Cellulose	Twine, halyards, rigging
Sisal†.....	Plant leaf	30-48	10-30	.....	.....	Lignocellulose	Twine, cordage
Manila†.....	Plant leaf	60-140	10-30	.....	.....	Lignocellulose	Rope, twine, cordage
Ramie†.....	Plant bast	3-10	24-70	1.52	.....	Cellulose	Household, apparel, seines
Silk.....	Silkworm	Any	5-23	1.35	11	Protein	Apparel, household, industrial
Glass.....	Manufactured	Any	3	2.5	0	Fused metal oxides	Industrial, household
Dacron.....	Manufactured	Any	8	1.38	0.4	Polyester	Apparel, industrial, household

1 in = 0.0254 m; 1 μ = 10^{-6} m. The more up-to-date term for the micron (μ) is the micrometer (μ m).

*Adapted from Smith, Textile Fibers, *Proc. ASTM*, 1944; Appel, A Survey of the Synthetic Fibers, *Am. Dyestuff Reporter*, 34, 1945, pp. 21-26; and other sources.

†These fibers are commercially used as bundles of cells. They vary greatly in width. Width figures given are for the individual cells.

‡In air at 70°F and 65 percent relative humidity.

Table 2. Tensile Properties of Single Fibers*

Fiber	Breaking tenacity, gpd	Extension at break, percent	Elastic recovery at corresponding strain, percent	Elastic modulus,† gpd
Glass.....	6.0-7.3	3.0-4.0	100 at 2.9	200-300
Fortisan (rayon).....	6.0-7.0	6	100 at 1.2 60 at 2.4	150-200
Flax.....	2.6-7.7	2.7-3.3	65 at 2	
Nylon 6, 6.....	4.6-9.2	16-32	100 at 8	25-50
Nylon 6.....	4.5-8.6	16-40	100 at 8	25-50
Silk.....	2.4-5.1	10-25	92 at 2	75-125
Saran.....	1.1-2.3	15-25	95 at 10	
Cotton.....	3.0-4.9	3-7	74 at 2	50-100
Steel (90,000 psi T.S.).....	0.9	28	.....	300
Steel (music wire).....	3.5	8	.....	300
Viscose rayon.....	1.5-5.0	15-30	82 at 2	50-150
Wool.....	1.0-1.7	25-35	99 at 2	25-40
Acetate rayon.....	1.3-1.5	23-34	100 at 1	25-40
Polyester.....	4.4-7.8	10-25	100 at 2	50-80
Polypropylene.....	4.0-7.0	15-25	95 at 7	15-50
Polytetrafluoroethylene.....	1.7	13	.....

*From Kaswell, "Wellington Sears Handbook of Industrial Textiles," Wellington Sears Co., Inc.

†From Kaswell, "Textile Fibers, Yarns, and Fabrics," Reinhold.

EXHIBIT 7



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DePuy Mitek, Inc.)	
a Massachusetts Corporation)	
)	
Plaintiff,)	
)	
v.	)	Civil Action No. 04-12457 PBS
)	
Arthrex, Inc.)	
a Delaware Corporation)	
)	
Defendant.)	

EXPERT REPORT OF DR. DEBI PRASAD MUKHERJEE
CONCERNING INVALIDITY OF U.S. PATENT NO. 5,314,446

Pursuant to the provisions of Rule 26(a)(2) of the Federal Rules of Civil Procedure, the Joint Case Management Statement adopted by the Court on February 18, 2005, and agreement between the parties, the undersigned, Dr. Debi Prasad Mukherjee, an expert witness for Defendants Arthrex, Inc. and Pearsalls, Limited (together, "Defendants") hereby sets forth his expert report as follows.

EXHIBIT 1 - DOCUMENTS REVIEWED AND CONSIDERED

- 1) U.S. Patent No. 5,314,446
- 2) Prosecution History of U.S. Patent No. 5,314,446
- 3) U.S. Patent No. 4,610,688
- 4) U.S. Patent No. 5,120,802
- 5) U.S. Patent No. 4,563,392
- 6) U.S. Patent No. 4,543,286
- 7) U.S. Patent No. 5,318,575
- 8) U.S. Patent No. 6,716, 234
- 9) U. S. Patent No. 3,454,011
- 10) U.S. Patent Application No. 2005/0149118
- 11) U.S. Patent Application No. 2004/0267313
- 12) UK Patent Application No. 2,218,312A to Burgess
- 13) Cohan, et al., *An Evaluation of Ultrastrong Polyethylene Fiber as an Ophthalmic Suture*, Arch Ophthalmol – Vol. 103, December 1985 (ARM 25132 - 137)
- 14) *Dyneema SK60, High strength/ high modulus fiber, Properties & Applications* (PR 08420 – 29)
- 15) Arthrex's responses to DePuy Mitek's interrogatories
- 16) DePuy Mitek's responses to Arthrex's interrogatories
- 17) Dr. Mark Steckel's laboratory notebooks
- 18) Deposition transcript of Dr. Mark Steckel
- 19) Deposition transcript of Dennis D. Jamiolkowski
- 20) Ethicon document DMI 095020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DEPUY MITEK
EXHIBIT 240
04cv12457

DePuy Mitek, Inc.
a Massachusetts Corporation

Plaintiff,

v.

Arthrex, Inc.
a Delaware Corporation

Defendant.

Civil Action No. 04-12457 PBS

RESPONSIVE EXPERT REPORT OF DR. DEBI PRASAD MUKHERJEE
CONCERNING NON-INFRINGEMENT OF U.S. PATENT NO. 5,314,446
AND OTHER MATTERS

Pursuant to the provisions of Rule 26(a)(2) of the Federal Rules of Civil Procedure, the Joint Case Management Statement adopted by the Court on February 18, 2005, and agreement between the parties, the undersigned, Dr. Debi Prasad Mukherjee, an expert witness for Defendants Arthrex, Inc. and Pearsalls, Limited (together, "Defendants") hereby sets forth his responsive expert report concerning non-infringement and other matters as follows.

EXHIBIT 1 - DOCUMENTS REVIEWED AND CONSIDERED

- 1) U.S. Patent No. 5,314,446
- 2) Prosecution History of U.S. Patent No. 5,314,446
- 3) Expert Report of Dr. David Brookstein
- 4) U.S. Patent No. 4,610,688
- 5) U.S. Patent No. 5,120,802
- 6) U.S. Patent No. 5,318,575
- 7) U.S. Patent No 4,563,392
- 8) U.S. Patent No. 4,543,286
- 9) U.S. Patent No. 5,147,383
- 10) U.S. Patent No. 5,089,013
- 11) U.S. Patent No. 4,532,929
- 12) U.S. Patent No. 4,994,074
- 13) U.S. Patent No. 4,983,180
- 14) U.S. Patent No. 4,649,920
- 15) UK Patent Application No. 2,218,312A to Burgess
- 16) Cohan, et al., *An Evaluation of Ultrastrong Polyethylene Fiber as an Ophthalmic Suture*, Arch Ophthalmol – Vol. 103, December 1985 (ARM 25132 - 137)
- 17) *Dyneema SK60, High strength/ high modulus fiber, Properties & Applications* (PR 08420 – 29)
- 18) Arthrex's responses to DePuy Mitek's interrogatories
- 19) DePuy Mitek's responses to Arthrex's interrogatories
- 20) Dr. Mark Steckel's laboratory notebooks
- 21) Deposition transcript of Dr. Mark Steckel
- 22) Deposition transcript of Dennis D. Jamiolkowski
- 23) Deposition transcript of Donald Grafton

24) Deposition transcript of Robert Sluss

25) Rodeheaver et al., Knotting and Handling Characteristics of Coated Synthetic Absorbable Suture, Journal of Surgical Research 35, 525-530 (1983).

26) Herrman, MD, Tensile Strength and Knot Security of Surgical Suture Materials, The American Surgeon, 209-217 (April 1971).

27) DMI 60231-34

28) DMI 94394

29) Arthrex FiberWire Directions for Use

30) DMI 39421, 39438

31) Ethicon Wound Closure Manual

32) ARM 699

33) Comparative Suture Testing Report of Center for Tribology, Inc.

34) Report of Robert Burks, MD

35) Pearsalls knot strength data document

36) Stiffness data for nylon and PET (www.maropolymeronline.com)

37) FiberStick marketing materials

38) Pearsalls Silkworm documents (PR 8400-03)

39) ARM 10564

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DePuy Mitek, Inc.
a Massachusetts Corporation

Plaintiff,

v.

Arthrex, Inc.
a Delaware Corporation

Defendant.

Civil Action No. 04-12457 PBS

REBUTTAL EXPERT REPORT OF DR. DEBI PRASAD MUKHERJEE

Pursuant to the provisions of Rule 26(a)(2) of the Federal Rules of Civil Procedure, the Joint Case Management Statement adopted by the Court on February 18, 2005, and agreement between the parties, the undersigned, Dr. Debi Prasad Mukherjee, an expert witness for Defendants Arthrex, Inc. and Pearsalls, Limited (together, "Defendants") hereby sets forth his rebuttal expert report as follows.

EXHIBIT 1 - DOCUMENTS REVIEWED AND CONSIDERED

- 1) U.S. Patent No. 5,314,446
- 2) Prosecution History of U.S. Patent No. 5,314,446
- 3) U.S. Patent No. 4,610,688
- 4) U.S. Patent No. 5,120,802
- 5) U.S. Patent No. 5,318,575
- 6) U.S. Patent No. 6,716, 234
- 7) UK Patent Application No. 2,218,312A to Burgess
- 8) Cohan, et al., *An Evaluation of Ultrastrong Polyethylene Fiber as an Ophthalmic Suture*, Arch Ophthalmol – Vol. 103, December 1985 (ARM 25132 - 137)
- 9) *Dyneema SK60, High strength/ high modulus fiber, Properties & Applications* (PR 08420 – 29)
- 10) Dr. Mark Steckel's laboratory notebooks
- 11) Deposition transcript of Dr. Mark Steckel
- 12) Cheng et al., *Radiation Processing for Modification of Polymers*, 2003 Annual Technical Conference of the Society of Plastics Engineering
- 13) Ethicon document DMI 095020

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DePuy Mitek Inc.,)	
a Massachusetts Corporation)	
)	
Plaintiff.)	
)	
v.	)	CIVIL ACTION NO. 04-12457 PBS
)	
Arthrex Inc.,)	
a Delaware Corporation)	
)	
Defendant.)	

Third Amended Notice Of Deposition Of Arthrex, Inc.

PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Civil Procedure 30, beginning at 9:00 a.m., on September 15 and 16, 2005, Plaintiff DePuy Mitek will take the deposition upon oral examination of Defendant Arthrex, Inc. at the Ritz Carlton Golf Resort, 2600 Tiburon Drive, Naples, Florida 34109 before a Notary Public or duly authorized officer authorized to administer oaths. The deposition will be recorded by stenographic means and may also be recorded by video or audio tape, and by instant visual display of the stenographic record.

Pursuant to FED. R. CIV. P. 30(b)(6), DePuy Mitek requests that Arthrex produce one or more officer(s), director(s), managing agent(s), or other persons who are designated and consent to testify on its behalf as to each of the topics set forth in Schedule A, attached hereto. Pursuant to said rule, Arthrex is required to prepare said designee(s) to testify as to matters known by, or reasonably available to, Arthrex falling within each of the stated topics.

Arthrex is requested to identify in writing to DePuy Mitek, on or before May 19, 2005, the persons who will testify on its behalf and the matters on which each such person will testify.

The deposition will proceed in accordance with the Federal Rules of Civil Procedure and will continue from day to day (Sundays and holidays excluded) until completed unless otherwise agreed.


You are invited to attend and cross-examine.

Date:

9/12/05

DEPUY MITEK, INC.,

By its attorneys,



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Schedule A

Definitions

1. For purposes of this deposition notice, “FiberWire suture(s)” means each Arthrex suture that is or have been sold under the tradenames FiberWire or TigerWire.
2. For purposes of this deposition notice, “FiberWire suture product(s)” means each Arthrex product that has been or is sold with a FiberWire suture attached to it (*e.g.*, Arthrex’s anchors and needles that are sold with FiberWire and TigerWire attached to them).

Topics

1. The design and development of FiberWire sutures, including all filament materials considered and the reasons for the same, all filament materials selected and the reasons for the same, all filaments materials rejected and the reasons for the same, all coatings considered and the reasons for the same, all coatings selected and the reasons for the same, all coatings rejected and the reasons for the same, the structure of all prototypes or samples considered in connection with developing FiberWire sutures, the reasons for selecting the structure of the FiberWire sutures currently being sold by Arthrex, and the reasons for rejecting other structures for the commercial FiberWire sutures.
2. The structure, construction, manufacturing and use of FiberWire sutures.
3. All materials that are used to construct FiberWire sutures, including, without limitation, polymers, coatings, dyes, or adhesives.
4. The properties of all the materials used to construct FiberWire sutures, including, without limitation, tensile strength, bending rigidity, knot strength, surface energy, coefficients of friction, knot slippage, knot security, pliability, and handleability.
5. Testing of the materials that are used to construct FiberWire sutures. Testing includes, without limitation, any testing relating to the tensile strength, bending rigidity, knot strength, surface energy, coefficients of friction, knot slippage, knot security, pliability, and handleability.
6. Testing of FiberWire sutures at various stages in the manufacturing process, including, without limitation, after braiding, before coating, after coating, before scouring, after scouring, before heat stretching, and after heat stretching. Testing includes, without limitation, any testing relating to the tensile strength, bending rigidity, knot strength, surface energy, coefficients of friction, knot slippage, knot security, pliability, and handleability.
7. The structure, design, construction, and use of Arthrex's FiberWire suture products and attaching them to FiberWire sutures.
8. An explanation of the persons involved in the development, design, manufacturing, marketing, and selling of Arthrex's FiberWire sutures and FiberWire suture products including their job titles and their respective involvement with the FiberWire sutures and FiberWire suture products.
9. The markets in which Arthrex's FiberWire sutures and FiberWire suture products compete including an explanation of what products Arthrex contends compete with them, the market share for each product since they were first sold, an explanation of Arthrex's marketing literature for its FiberWire sutures and FiberWire suture products, and the steps taken to market FiberWire sutures and FiberWire suture products.
10. Arthrex's marketing and business plans for FiberWire sutures and FiberWire suture products.

11. The manufacturing process for producing each FiberWire suture and FiberWire suture product, including those that are sold outside of the United States including, but not limited to, each entity that is involved in making each such product, the responsibility of each entity with respect to FiberWire sutures and FiberWire suture products, each entity's relationship with Arthrex, Inc., any contract between Arthrex, Inc. and each entity that involves FiberWire sutures or FiberWire sutures products, where each manufacturing process is performed on FiberWire suture and FiberWire suture product, and the chain of production of each FiberWire suture and FiberWire suture product from materials to a final product.
12. Communications with the Federal Food and Drug Administration concerning FiberWire sutures and FiberWire suture products.
13. All facts supporting Arthrex's contentions that it relied on and was "materially prejudiced" by "DePuy Mitek's silence" as alleged in Arthrex's Response to DePuy Mitek's Interrogatory No. 8.
14. Arthrex's corporate history and structure.

CERTIFICATE OF SERVICE

I certify that the foregoing DePuy Mitek Inc.'s Third Amended Notice of Deposition of Arthrex, Inc. was served *via* facsimile on September 12, 2005 on the following:

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Dated: September 12, 2005



Erich M. Falke